

No. 11753

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

JAMES M. MOSCA, otherwise known as James M. Fly,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

TRANSCRIPT OF RECORD

Upon Appeal From the District Court of the United States
for the Southern District of California
Central Division

FILED

JAN 30 1948

PAUL P. O'BRIEN, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS:

For Appellant:

CHARLES H. CARR

675 Subway Terminal Building
417 South Hill Street
Los Angeles 13, Calif.

For Appellee:

JAMES M. CARTER
United States Attorney

ERNEST A. TOLIN

HOMER H. BELL
Assistants U. S. Attorney

600 U. S. Post Office and Court House Building
Los Angeles 12, Calif. [1*]

In the District Court of the United States
in and for the Southern District of California
Central Division

February, 1946, Term
No. 19342

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JAMES M. MOSCA, otherwise known as James M. Fly,
Defendant.

INDICTMENT

Title 18, U. S. C., Sec. 80—Making and Using, and Causing to Be Made and Used a False Bill, Account, Claim and Certificate—Sugar Ration Check—in a Matter Within the Jurisdiction of an Agency of the United States.

Title 50, U. S. C., App., Sec. 633; Gen. Ration Ord. 8, Secs. 2.6 and 2.9; Illegal Use and Transfer of Ration Documents.

The grand jury charges:

COUNT ONE

[U. S. C., Title 18, Sec. 80]

On or about November 11, 1946, in the County of Los Angeles, California, James M. Mosca, otherwise known as James M. Fly, knowingly and wilfully made and used and caused to be made and used a false bill, account, claim and certificate, to wit, a sugar ration check in the amount of 10,000 pounds of sugar, drawn on the Santa Monica

and Vermont Branch of the Bank of America, and bearing the signature, as maker, of James M. Fly on behalf of the Italian American Import Co., knowing the same to contain a fraudulent and fictitious statement and entry in a matter within the jurisdiction of the Office of Price Administration, an agency of the United States Government, namely, sugar ration accounts kept pursuant to the provisions of Third Revised Ration Order 3 [11 F. R. 177], promulgated by said agency pursuant to law, in that, at said time and place, there was no sugar ration account in the name of James M. Mosca, alias James M. Fly, or the Italian American Import Co., in the Santa Monica and Vermont Branch of the Bank of America. [2]

COUNT TWO

[U. S. C., Title 18, Sec. 80]

On or about November 22, 1946, in the County of Los Angeles, California, James M. Mosca, otherwise known as James M. Fly, knowingly and wilfully made and used and caused to be made and used a false bill, account, claim and certificate, to wit, a sugar ration check in the amount of 1,500 pounds of sugar, drawn on the Santa Monica and Vermont Branch of the Bank of America, and bearing the signature, as maker, of James M. Fly on behalf of the Italian American Import Co., knowing the same to contain a fraudulent and fictitious statement and entry in a matter within the jurisdiction of the Office of Price Administration, an agency of the United States Government, namely, sugar ration accounts kept pursuant to the provisions of Third Revised Ration Order 3 [11 F. R. 177], promulgated by said agency pursuant to law, in that, at said time and place, there was no sugar ration account in the name of James M. Mosca, alias James M. Fly, or the

Italian American Import Co., in the Santa Monica and Vermont Branch of the Bank of America. [3]

COUNT THREE

[U. S. C., Title 18, Sec. 80]

On or about November 23, 1946, in the County of Los Angeles, California, James M. Mosca, otherwise known as James M. Fly, knowingly and wilfully made and used and caused to be made and used a false bill, account, claim and certificate, to wit, a sugar ration check in the amount of 1,600 pounds of sugar, drawn on the Santa Monica and Vermont Branch of the Bank of America, and bearing the signature, as maker, of James M. Fly on behalf of the Italian American Import Co., knowing the same to contain a fraudulent and fictitious statement and entry in a matter within the jurisdiction of the Office of Price Administration, an agency of the United States Government, namely, sugar ration accounts kept pursuant to the provisions of Third Revised Ration Order 3 [11 F. R. 177], promulgated by said agency pursuant to law, in that, at said time and place, there was no sugar ration account in the name of James M. Mosca, alias James M. Fly, or the Italian American Import Co., in the Santa Monica and Vermont Branch of the Bank of America. [4]

COUNT FOUR

[U. S. C., Title 18, Sec. 80]

On or about November 29, 1946, in the County of Los Angeles, California, James M. Mosca, otherwise known as James M. Fly, knowingly and wilfully made and used and caused to be made and used, a false bill, account, claim and certificate, to wit, a sugar ration check in the amount of 3,500 pounds of sugar, drawn on the Santa Monica and

Vermont Branch of the Bank of America, and bearing the signature, as maker, of James M. Fly on behalf of the Italian American Import Co., knowing the same to contain a fraudulent and fictitious statement and entry in a matter within the jurisdiction of the Office of Price Administration, an agency of the United States Government, namely, sugar ration accounts kept pursuant to the provisions of Third Revised Ration Order 3 [11 F. R. 177], promulgated by said agency pursuant to law, in that, at said time and place, there was no sugar ration account in the name of James M. Mosca, alias James M. Fly, or the Italian American Import Co., in the Santa Monica and Vermont Branch of the Bank of America. [5]

COUNT FIVE

[U. S. C., Title 18, Sec. 80]

On or about November 19, 1946, in the County of Los Angeles, California, James M. Mosca, otherwise known as James M. Fly, knowingly and wilfully made and used and caused to be made and used a false bill, account, claim and certificate, to wit, a sugar ration check in the amount of 10,000 pounds of sugar, drawn on the Santa Monica and Vermont Branch of the Bank of America, and bearing the signature, as maker, of James M. Fly on behalf of the Italian American Import Co., knowing the same to contain a fraudulent and fictitious statement and entry in a matter within the jurisdiction of the Office of Price Administration, an agency of the United States Government, namely, sugar ration accounts kept pursuant to the provisions of Third Revised Ration Order 3 [11 F. R. 177], promulgated by said agency pursuant to law, in that, at said time and place, there was no sugar ration account in the name of James M. Mosca, alias James M. Fly, or the

Italian American Import Co., in the Santa Monica and Vermont Branch of the Bank of America. [6]

COUNT SIX

[U. S. C., Title 18, Sec. 80]

On or about November 22, 1946, in the County of Los Angeles, California, James M. Mosca, otherwise known as James M. Fly, knowingly and wilfully made and used and caused to be made and used a false bill, account, claim and certificate, to wit, a sugar ration check in the amount of 10,000 pounds of sugar, drawn on the Santa Monica and Vermont Branch of the Bank of America, and bearing the signature, as maker, of James M. Fly on behalf of the Italian American Import Co., knowing the same to contain a fraudulent and fictitious statement and entry in a matter within the jurisdiction of the Office of Price Administration, an agency of the United States Government, namely, sugar ration accounts kept pursuant to the provisions of Third Revised Ration Order 3 [11 F.R. 177], promulgated by said agency pursuant to law, in that, at said time and place, there was no sugar ration account in the name of James M. Mosca, alias James M. Fly, or the Italian American Import Co., in the Santa Monica and Vermont Branch of the Bank of America. [7]

COUNT SEVEN

[U. S. C., Title 18, Sec. 80]

On or about October 22, 1946, in the County of Los Angeles, California, James M. Mosca, otherwise known as James M. Fly, knowingly and wilfully made and used and caused to be made and used a false bill, account, claim and certificate, to wit, a sugar ration check in the amount of 5,000 pounds of sugar, drawn on the Santa Monica and

Vermont Branch of the Bank of America, and bearing the signature, as maker, of James M. Fly on behalf of the Italian American Import Co., knowing the same to contain a fraudulent and fictitious statement and entry in a matter within the jurisdiction of the Office of Price Administration, an agency of the United States Government, namely, sugar ration accounts kept pursuant to the provisions of Third Revised Ration Order 3 [11 F. R. 177], promulgated by said agency pursuant to law, in that, at said time and place, there was no sugar ration account in the name of James M. Mosca, alias James M. Fly, or the Italian American Import Co., in the Santa Monica and Vermont Branch of the Bank of America. [8]

COUNT EIGHT

[U. S. C., Title 50, App., Sec. 633; Gen. Ration Order 8, Sec. 2.6 (8 F. R. 3783)]

On or about November 30, 1946, in the County of Los Angeles, California, James M. Mosca, otherwise known as James M. Fly, wilfully used and transferred ration documents, to wit, two sugar ration checks drawn on the Santa Monica and Vermont Branch of the Bank of America, and bearing the signature, as maker, of James M. Fly on behalf of the Italian American Import Co., purporting to transfer 2,500 pounds of sugar each to Smart and Final Co., Ltd., Unit 65, 834 West Jefferson, Los Angeles, California, in exchange for 5,000 pounds of sugar, in a way and for a purpose not permitted by a ration order, in that, at said time and place, there was no sugar ration account in the name of James M. Mosca, alias James M. Fly, or the Italian American Import Co., in the Santa Monica and Vermont Branch of the Bank of America. [9]

COUNT NINE

[U. S. C., Title 50, App., Sec. 633; Gen. Ration Order 8,
Sec. 2.6 (8 F. R. 3783)]

On or about October 30, 1946, in the County of Los Angeles, California, James M. Mosca, otherwise known as James M. Fly, wilfully used and transferred ration documents, to wit, one sugar ration check drawn on the Santa Monica and Vermont Branch of the Bank of America, and bearing the signature, as maker of James M. Fly on behalf of the Italian American Import Co., purporting to transfer 5,000 pounds of sugar to Smart and Final Co., Ltd., Unit 65, 834 West Jefferson, Los Angeles, California, in exchange for 5,000 pounds of sugar, in a way and for a purpose not permitted by a ration order, in that, at said time and place, there was no sugar ration account in the name of James M. Mosca, alias James M. Fly, or the Italian American Import Co., in the Santa Monica and Vermont Branch of the Bank of America. [10]

COUNT TEN

[U. S. C., Title 50, App., Sec. 633; Gen. Ration Order 8,
Sec. 2.6 (8 F. R. 3783)]

On or about November 7, 1946, in the County of Los Angeles, California, James M. Mosca, otherwise known as James M. Fly, wilfully used and transferred ration documents, to wit, one sugar ration check drawn on the Santa Monica and Vermont Branch of the Bank of America, and bearing the signature, as maker, of James M. Fly on be-

half of the Italian American Import Co., purporting to transfer 2,500 pounds of sugar to Smart and Final Co., Ltd., Unit 65, 834 West Jefferson, Los Angeles, California, in exchange for 2,500 pounds of sugar, in a way and for a purpose not permitted by a ration order, in that, at said time and place, there was no sugar ration account in the name of James M. Mosca, alias James M. Fly, or the Italian American Import Co., in the Santa Monica and Vermont Branch of the Bank of America. [11]

COUNT ELEVEN

[U. S. C., Title 50, App., Sec. 633; Gen. Ration Order 8, Sec. 2.6 (8 F. R. 3783)]

On or about November 20, 1946, in the County of Los Angeles, California, James M. Mosca, otherwise known as James M. Fly, wilfully used and transferred ration documents, to wit, one sugar ration check drawn on the Santa Monica and Vermont Branch of the Bank of America, and bearing the signature, as maker, of James M. Fly on behalf of the Italian American Import Co., purporting to transfer 3,000 pounds of sugar to Smart and Final Co., Ltd., Unit 65, 834 West Jefferson, Los Angeles, California, in exchange for 3,000 pounds of sugar, in a way and for a purpose not permitted by a ration order, in that, at said time and place, there was no sugar ration account in the name of James M. Mosca, alias James M. Fly, or the Italian American Import Co., in the Santa Monica and Vermont Branch of the Bank of America. [12]

COUNT TWELVE

[U. S. C., Title 50, App., Sec. 633; Gen. Ration Order 8,
Sec. 2.6 (8 F.R. 3783)]

On or about November 29, 1946, in the County of Los Angeles, California, James M. Mosca, otherwise known as James M. Fly, wilfully used and transferred ration documents, to wit, one sugar ration check drawn on the Santa Monica and Vermont Branch of the Bank of America, and bearing the signature, as maker, of James M. Fly on behalf of the Italian American Import Co., purporting to transfer 2,500 pounds of sugar to Smart and Final Co., Ltd., Unit 65, 834 West Jefferson, Los Angeles, California, in exchange for 2,500 pounds of sugar, in a way and for a purpose not permitted by a ration order, in that, at said time and place, there was no sugar ration account in the name of James M. Mosca, alias James M. Fly, or the Italian American Import Co., in the Santa Monica and Vermont Branch of the Bank of America.

A True Bill.

JOHN M. McADAM,
Foreman

JAMES M. CARTER
United States Attorney

[Endorsed]: Filed May 14, 1947. Edmund L. Smith,
Clerk. [13]

[Minutes: Monday, May 26, 1947.]

Present: The Honorable Jacob Weinberger, District Judge.

This cause coming on for arraignment and plea of defendant James M. Mosca, otherwise known as James M. Fly; Homer H. Bell, Assistant U. S. Attorney, appearing as counsel for the Government; Chas. H. Carr, Esq., appearing as counsel for the said defendant, who is present on bond:

The defendant states his true name is James M. Fly.

It is ordered that the cause is hereby continued to June 9, 1947, at 10 a. m., for plea, pursuant to request of defendant. [14]

[Minutes: Monday, June 23, 1947]

Present: The Honorable Wm. C. Mathes, District Judge.

Further hearing on motion filed June 6, 1947, to dismiss;

R. H. Kinnison, Ass't U. S. Att'y for Gov't;

Chas. H. Carr, Esq., for defendant, who is present on bond:

Attorney Carr waives reading of the Indictment and the defendant pleads not guilty to all 12 counts.

Said motion to dismiss is denied.

Case set for trial July 22, 1947, 10 A. M., before Judge Ling. [20]

[Minutes: Thursday, September 25, 1947]

Present: The Honorable Leon R. Yankwich, District Judge.

For further jury trial; Homer H. Bell, Ass't U. S. Att'y, present for Gov't; Chas. H. Carr, Esq., present for defendant, who was charged as Mosca, and who is present on bond; and the jury being present;

Court instructs the jury. Attorney Carr states he has objections to the instructions as given.

At 11 A. M. the jury is excused and withdraws from the court room and in the absence of the jury, Attorney Carr argues his objections. Attorney Bell states and argues an objection.

At 11:06 A. M. the jury is brought back into court and the Court informs the jury that the instructions stand as heretofore given.

Glenn Fuller is sworn as bailiff to take charge of the jury during its deliberation upon a verdict, and at 11:08 A. M. jury retires to deliberate.

Instructions as given and as refused are filed.

At 11:30 A. M. the jury request, and on order of Court are given through the bailiff, the instructions. At noon the jury request, and on order of Court are given through bailiff, the Indictment.

At 12:15 P. M. court reconvenes herein and the jury being present, defendant and counsel being present, verdict is presented, read, and ordered filed and entered herin, to-wit:

* * * * *

Court discharges the jury from the case and excuses them until further notice. Court orders the case referred to the Prob. Officer for investigation and report and continued hereby to Oct. 3, 1947, 1:30 P. M., for hearing said report and sentence, defendant meantime to remain on bond. [21]

[Title of District Court and Cause]

VERDICT

We, the Jury in the above-entitled cause, find the defendant, James M. Fly,

Guilty as charged in Count One of the Indictment;
and

Guilty as charged in Count Two of the Indictment;
and

Guilty as charged in Count Three of the Indictment;
and

Guilty as charged in Count Four of the Indictment;
and

Guilty as charged in Count Five of the Indictment;
and

Guilty as charged in Count Six of the Indictment;
and

Guilty as charged in Count Seven of the Indictment;
and

Guilty as charged in Count Eight of the Indictment;
and

Guilty as charged in Count Nine of the Indictment;
and

Guilty as charged in Count Ten of the Indictment;
and

Guilty as charged in Count Eleven of the Indictment;
and

Guilty as charged in Count Twelve of the Indictment.

Dated: September 25th, 1947.

WILLIAM J. DORAN

Foreman of the Jury.

[Endorsed]: Filed Sep. 25, 1947. Edmund L. Smith,
Clerk. [22]

[Title of District Court and Cause]

NOTICE OF RENEWAL OF MOTION FOR JUDG-
MENT OF ACQUITTAL UNDER RULE 29 OF
FEDERAL RULES OF CRIMINAL PROCE-
DURE

To Plaintiff, United States of America, and to James M. Carter, United States Attorney for the Southern District of California, and to Norman W. Neukom and Homer H. Bell, Assistant United States Attorneys for Said District, 600 Federal Building, Los Angeles, California, Attorneys for Plaintiff:

Please Take Notice that the Defendant in this case, James M. Fly, will, in the United States District Court for the Southern District of California, Central Division, on October 3, 1947, at 1:30 P. M., or as soon thereafter as the Motion can be heard in the courtroom of the Hon. Leon R. Yankwich, renew his Motion for Judgment of Acquittal under Rule 29, Federal Rules of Criminal Procedure as to Counts 1 to 7 of the Indictment, both inclusive.

CHARLES H. CARR

Attorney for Defendant, James H. Fly [23]

[Title of District Court and Cause]

RENEWAL OF MOTION FOR JUDGMENT OF
ACQUITTAL UNDER RULE 29 OF FEDERAL
RULES OF CRIMINAL PROCEDURE AND
POINTS AND AUTHORITIES

Defendant James M. Fly renews his Motion for Judgment of Acquittal to Counts One to Seven of the Indictment, both inclusive.

CHARLES H. CARR

Attorney for Defendant James M. Fly [24]

Received copy of the within Notice and Renewal of Motion this 30th day of September, 1947. James M. Carter, U. S. Atty., Attorney for Plaintiff, by L. Wayne Thomas, Chief Clerk.

[Endorsed]: Filed Sep. 30, 1947. Edmund L. Smith, Clerk. [25]

[Minutes: Friday, October 3, 1947]

Present: The Honorable Leon R. Yankwich, District Judge.

For hearing report of Prob. Officer and for sentence; and for hearing renewed motion of defendant, filed Sept. 30, 1947, for judgment of acquittal; Homer H. Bell, Ass't U. S. Att'y, present for Gov't; Chas. H. Carr, Esq., present for defendant, who is present;

Court makes a statement re motion. Court denies motion for acquittal. Attorney Bell makes a statement.

Court pronounces sentence upon defendant and fines him as follows:

* * * * *

Vic Nardoni, who bonded defendant, consents and Court orders defendant remain on present bond until notice of appeal has been filed, and have stay of execution until time for filing notice of appeal has expired. [26]

District Court of the United States for the
Southern District of California
Central Division

No. 19,342 Criminal

Indictment—12 counts

18 U. S. C. 80; 50 U. S. C. App. 633

UNITED STATES OF AMERICA

v.

JAMES M. FLY (charged as James M. Mosca)

JUDGMENT AND COMMITMENT

On this 3rd day of October, 1947, came the attorney for the government and the defendant appeared in person and by counsel, Charles H. Carr, Esq.,

It Is Adjudged that the defendant has been convicted upon his plea of not guilty to all counts, and a verdict of guilty as to all counts of the offenses of (ct 1) that on or about Nov. 11, 1946 in the County of Los Angeles, Calif., defendant knowingly and wilfully made and used a false bill, account, claim and certificate to-wit a sugar ration check for 10,000 pounds sugar knowing the same to contain a fraudulent and fictitious statement to the U. S. government in that there was no sugar ration account as indicated by the check (cts 2-7 inc charge violations similar to that of ct 1); (ct 8) that on Nov. 30, 1946 in said county, defendant wilfully transferred sugar ration checks contrary to law; (cts 9-12 are similar to that of ct 8), as charged in said Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment in an institution of the jail type for a period of one year on count 1, one year on count 2, one year on count three, one year on count 4, one year on count 5, one year on count 6, and one year on count 7; sentences on each counts 2, 3, 4, 5, 6, and 7 to begin and run concurrently with sentence imposed on count 1; that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment in an institution of the jail type for a period of one year on count 8, said sentence on count 8 to run consecutively with sentences imposed on counts 1 to 7 inclusive; that the defendant pay unto the United States of America a fine of \$10,000.00 on count 9, a fine of \$5,000.00 on count 10, a fine of \$5000.00 on count 11, and a fine of \$5000.00 on count 12 (making a total of \$25,000.00 in fines), and stand committed to an institution of the jail type till said fines are paid or defendant is discharged therefrom by due process of law.

It Is Ordered that execution on each counts 1 to 12 inclusive is stayed until the time for filing notice of appeal from this judgment has expired.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Mar-

shal or other qualified officer and that the copy serve as the commitment of the defendant.

LEON R. YANKWICH

United States District Judge.

[Endorsed]: Filed Oct. 3, 1947. Edmund L. Smith, Clerk. [27]

[Title of District Court and Cause]

NOTICE OF APPEAL

Name and Address of Appellant: James M. Mosca, otherwise known as James M. Fly 5138 Maplewood Avenue, Los Angeles, Los Angeles, California

Name and Address of Appellant's Attorney: Charles H. Carr 675 Subway Terminal Building, Los Angeles, Calif.

Offense: Title 18, U. S. C., Sec. 80; Title 50, U. S. C., App., Sec. 633; Gen. Ration Ord. 8, Secs. 2.6 and 2.9.

Concise Statement of Judgment or Order, Giving Date, and Any Sentence:

Defendant having been found guilty on twelve counts of the Indictment, the Court, on October 3, 1947, pronounced judgment as follows:

The Court ordered Defendant committed to the [28] custody of the Attorney General for imprisonment for a period of one year on each of the first seven counts of

the Indictment, both inclusive, sentences on all seven counts to begin and to run concurrently with the sentence imposed on the first count, and for a period of one year on the eighth count of the indictment, said term of imprisonment on the eighth count to begin to run at the termination of the sentence imposed on the first count.

The Court also imposed a fine of Ten Thousand & No/100 (\$10,000) Dollars on the ninth count of the Indictment, and fines of Five Thousand & No/100 (\$5,000) Dollars each on the tenth, eleventh and twelfth counts of the Indictment, making a total fine of Twenty-five Thousand & No/100 (\$25,000) Dollars; the defendant to stand committed until the fines are paid.

The above judgment was entered October 3, 1947.

The above-named appellant, James M. Mosca, otherwise known as James M. Fly, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the above-stated judgment.

Dated this 9th day of October, 1947.

CHARLES H. CARR

Attorney for Appellant

[Endorsed]; Filed Oct 9 1947. Edmund L. Smith,
Clerk. [29]

[Title of District Court and Cause]

STIPULATION FOR TRANSMISSION OF ORIGINAL EXHIBITS TO NINTH CIRCUIT COURT OF APPEALS

It Is Hereby Stipulated between Counsel for the Defendant, James M. Mosca, otherwise known as James M. Fly, and Counsel for the Plaintiff, United States of America, subject to order of the Court and pursuant to Rule 75(i), Federal Rules of Procedure, that all of the original exhibits in the above-entitled case may be withdrawn from the files of this Court and forwarded by the Clerk of the United States District Court to the Clerk of the Circuit Court of Appeals for the Ninth Circuit for inspection by the Appellate Court in lieu of copies thereof, and that said original exhibits may be returned to the Clerk of [32] the United States District Court after they have served their purpose.

Dated: October 28, 1947.

CHARLES H. CARR

Attorney for Defendant

JAMES M. CARTER

United States Attorney for the Southern District
of California, Attorney for Plaintiff, United
States of America

By HOMER H. BELL

Assistant United States Attorney.

[Endorsed]: Filed Oct 29 1947. Edmund L. Smith,
Clerk. [33]

[Title of District Court and Cause]

ORDER FOR TRANSMISSION OF ORIGINAL
EXHIBITS TO NINTH CIRCUIT COURT OF
APPEALS

Defendant, James M. Mosca, otherwise known as James M. Fly, having appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the Judgment herein entered on October 3, 1947; and

The said Defendant and Plaintiff having, through their attorneys, by stipulation agreed that all original exhibits in the within action may be transmitted to the Circuit Court of Appeals for the Ninth Circuit; and

The Court having, under Rule 75(i), Federal Rules of Civil Procedure, deemed it necessary and appropriate that all original exhibits in the within action be sent to the Circuit Court of Appeals for the Ninth Circuit in lieu of copies thereof, and that the originals be inspected by said Appellate Court; [34]

It Is Hereby Ordered, Adjudged and Decreed that all original exhibits in the within action shall be withdrawn from the files of this Court and transmitted by the Clerk thereof to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit so that said original exhibits may be sent to the Circuit Court of Appeals for the Ninth Circuit in lieu of copies thereof, and the originals inspected by said Appellate Court; and

It Is Further Ordered, Adjudged And Decreed that after said original exhibits have served their purpose in

said Appellate Court, they be returned by the Clerk of the Circuit Court of Appeals for the Ninth Circuit to the Clerk of the United States District Court for the Southern District of California.

PAUL J. McCORMICK

Judge U. S. District Court

Presented by

CHARLES H. CARR

Attorney for Defendant

Approved as to form:

JAMES M. CARTER

United States Attorney for the

Southern District of California

By Homer H. Bell

Assistant United States Attorney

[Endorsed]: Filed Oct. 29, 1947. Edmund L. Smith,
Clerk. [35]

[Title of District Court and Cause]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 35, inclusive, contain full, true and correct copies of Indictment; Minute Order dated May 26, 1947; No-

tice of Motion to Dismiss the Indictment; Motion of Defendant to Dismiss the Indictment; Minute Order dated June 23, 1947; Minute Order dated September 25, 1947; Verdict; Notice of Renewal of Motion for Judgment of Acquittal under Rule 29 of Federal Rules of Criminal Procedure; Renewal of Motion for judgment of Acquittal under Rule 29 of Federal Rules of Criminal Procedure and Points and Authorities; Minute Order dated October 3, 1947; Judgment and Commitment; Notice of Appeal; Designation of Contents of Record on Appeal; Stipulation for Transmission of Original Exhibits to Ninth Circuit Court of Appeals; and Order for Transmission of Original Exhibits to Ninth Circuit Court of Appeals, which, together with one volume of reporters' transcript, original Government's exhibits 1, 2, 3, 4, 5, 6, 7, 7-A, 7-B, 8, 9, 10, 11, 12 and 13, and original Defendant's exhibits A-1 and A-2 transmitted herewith, constitute the record on appeals to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$9.40, which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court, this 14th day of November, A. D. 1947.

(Seal)

EDMUND L. SMITH

Clerk

By R. B. Clifton

Deputy Clerk

[Title of District Court and Cause.]

Honorable Leon R. Yankwich, Judge Presiding

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California, Tuesday, September 23, 1947

Appearances:

For the Plaintiff: James M. Carter, Esquire, U. S. Attorney, by Homer H. Bell, Esquire, Asst. U. S. Attorney.

For the Defendant: Charles H. Carr, Esquire.

Los Angeles, California, Tuesday, Sept. 23, 1947,
1:00 P. M.

The Court: You may call the case, Mr. Clerk.

The Clerk: United States of America, plaintiff, versus James M. Mosca, otherwise known as James M. Fly, defendant. No. 19,342-Y, Criminal.

Mr. Carr: The defendant is ready, your Honor.

Mr. Bell: The plaintiff is ready.

(Whereupon a jury was duly impaneled and sworn.)

The Court: Do you desire to make an opening statement?

Mr. Bell: Yes.

Mr. Carr: If the court please, I think it is probably appropriate since I am going to ask that the Government witnesses be excluded as well as my own, that they be excluded now before the opening statements are made. Sometimes I think it is advisable for them not to have the benefit of the opening statements.

The Court: You say none of your witnesses are here.

Mr. Carr: They will be excluded along with the Government's witnesses.

The Court: The witnesses for the Government and the defendant will follow the bailiff and remain absent from the courtroom during the proceedings until called. Call your first witness.

Mr. Bell: May Mr. Austin remain in the courtroom? [4*]

Mr. Carr: I have no objection to him staying here.

Mr. Bell: And, your Honor, may we have permission for the man who investigated the case to stay here at the table with me?

The Court: Mr. Carr knows that we do not exclude investigators for any board or the F.B.I. or any person employed by an investigating body.

Mr. Carr: Yes, your Honor.

The Court: You may proceed.

(Opening statement by Mr. Carr.)

(Opening statement by Mr. Bell.)

The Court: You may proceed, gentlemen. Let the record show the jury is in the box and the defendant is in court with his counsel.

Mr. Bell: I have submitted to the clerk certain requested instructions on behalf of the Government.

The Court: All right.

Mr. Bell: Mr. Austin, will you take the stand?

Mr. Carr: May we have a copy of the requested instructions?

Mr. Bell: A copy was placed on counsel's table.

The Court: Very well. [5]

*Page number appearing at top of page of original Reporter's Transcript.

WILLIAM H. AUSTIN,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: William H. Austin.

Direct Examination

By Mr. Bell:

Q. What is your occupation, Mr. Austin?

A. I am manager of the Unit W for Smart & Final Company.

Q. Were you so occupied during the year 1946?

A. Yes, sir.

Q. Do you know the defendant, Mr. James Fly?

A. Yes, sir.

Q. How long have you known him?

A. Since about 1944.

Q. Did you ever meet Mr. Fly in connection with your duties at Smart & Final Company?

A. Yes, sir.

Q. Did you have any conversation with him in connection with your duties at all?

A. Yes, sir.

Q. When was the first occasion, do you recall?

A. About July.

Q. What year? [6] A. 1946.

Q. Where did the conversation take place?

A. Took place at Unit W, the unit I manage.

Q. Was anyone else present? A. No, sir.

Q. What was the conversation that you had?

A. Well, Mr. Fly came into my store and said he had a lot of—wanted to buy a lot of sugar—buy 10,000 pounds at a time and he said the deal was legitimate.

(Testimony of William H. Austin)

He wanted to know whether or not I could get him that amount of sugar. I told him no, that—I told him I could but I couldn't get it direct from our main warehouse; that I would have to call and see how it would have to be handled—whether I could get it from our main warehouse or direct from the C & H Sugar Company.

Mr. Carr: It is awfully hard to hear you, Mr. Witness. Will you speak a little louder?

Q. By Mr. Bell: Did he say anything to that?

A. Yes. He told me to go ahead and call Fred Junker, who is our buyer in Glendale and find out how I could get it delivered and this I did.

Q. Did you thereafter have any further conversation with Mr. Fly?

A. Yes, the following Monday.

Q. And where did that conversation occur? [7]

A. That was also in my store at Melrose and Fairfax.

Mr. Carr: I can't hear you, Mr. Witness.

The Court: Speak louder, please.

Mr. Bell: He said that was at Melrose and Fairfax.

The Witness: Melrose and Fairfax, yes.

Q. By Mr. Bell: Was anyone else present?

A. No.

Q. What was the conversation?

A. Well, I told him that I could get his sugar delivered and it would probably come Tuesday or Wednesday.

Q. What did he say, if anything?

A. He said, "Okay, go ahead and place the order."

(Testimony of William H. Austin)

Q. What happened after that?

A. He gave me a check for 10,000 pounds, the point check for the sugar and also a check for the money for the 10,000 pounds.

Q. Pardon me. You have said pounds and points. Which do you recall it to be? A. (No answer.)

Q. You said the check was made out for something, 10,000 what? Points or pounds?

A. 10,000 pounds.

Q. Did you see him write the check? A. Yes.

Q. What happened after that, if anything? [8]

A. Well, the sugar was delivered on a Tuesday or Wednesday and I called Mr. Fly and told him that the sugar was there and he sent a truck to pick it up.

Q. What did you do with the check?

A. The check? I sent the check in to the—the sugar check?

Q. Yes, the sugar check.

A. The sugar check I deposited it at my bank.

Q. Did you have any other dealings with Mr. Fly after that? A. Yes, the following Saturday.

Q. What happened?

A. I picked up another at his Sunset store. He told me to come by, which I did, and picked up another check for ten thousand pounds, check for the money to pay for the ten thousand pounds of sugar.

Q. Did you see him write that check?

A. Yes, sir.

Q. Do you know a man by the name of Woodrow Larson? A. Yes, sir.

Q. Who is he?

A. He was my helper at Unit W at that time.

(Testimony of William H. Austin)

Q. Did you have other dealings with Mr. Fly following that?

A. Yes, sir; about six to eight weeks following that [10] I had the same procedure. Every week I would go by his cafe on Riverside Drive and pick up the check for the sugar. I would order the sugar and it would be delivered either Tuesday or Wednesday of that week.

Q. How much sugar did you sell him in all?

A. Altogether about 124,700 pounds.

Mr. Carr: I move to strike that question and answer, your Honor, as being wholly immaterial—the amount he sold him.

Mr. Bell: It is a course of conduct.

The Court: Yes, objection overruled.

Q. By M. Bell: You said you picked up the checks. Did you see him sign the checks on each of these occasions? A. Yes, sir.

Mr. Bell: I would like to have the clerk mark for identification a check and what appears to be an invoice of the Smart & Final Company.

The Clerk: Marked as Government's Exhibit 1 for identification.

(The document referred to was marked as Plaintiff's Exhibit 1, for identification.)

Mr. Bell: I will exhibit this to counsel while I am having another one marked for identification.

I would like to have a similar pair, a check and invoice, marked for identification. [10]

The Clerk: Government's Exhibit 2, for identification.

(Testimony of William H. Austin)

(The documents referred to were marked as Plaintiff's Exhibit 2, for identification.)

Mr. Bell: I show defendant's counsel Government's Exhibit 2, and ask that another pair of check and invoice be marked for identification.

The Clerk: Government's Exhibit 3 for identification.

(The documents referred to were marked as Plaintiff's Exhibit 3, for identification.)

Mr. Bell: I exhibit Government's Exhibit 3 to counsel, and ask that another pair be marked for identification.

The Clerk: Government's Exhibit 4.

(The document referred to were marked as Plaintiff's Exhibit 4, for identification.)

Mr. Bell: I show Government's Exhibit 4 to counsel, and ask another pair be marked for identification.

The Clerk: Government's Exhibit 5, for identification.

(The documents referred to were marked as Plaintiff's Exhibit 5, for identification.)

Mr. Bell: I exhibit Government's Exhibit 5 to counsel for defendant, and ask that another pair, a check and invoice, be marked for identification.

The Clerk: Government's Exhibit 6 for identification.

(The documents referred to were marked as Plaintiff's Exhibit 6, for identification.) [11]

Mr. Bell: I now exhibit Government's Exhibit 6 to counsel.

(Testimony of William H. Austin)

Q. By Mr. Bell: Mr. Austin, when these transactions took place were any records of them made for your company?

A. Yes, sir. I sent the original copy to our main office in Glendale.

Q. You say you sent the original copy. What did you make? What kind of record?

A. (No answer.)

Q. What kind of record did you make for your company?

A. We have sales books. We make an original copy and a duplicate for the customer.

Q. Well, is that what you call an invoice?

A. Yes, sir, an invoice.

Q. And after you made them—was it the regular course of your business to make such records?

A. Yes, sir.

Q. And were those record made in the regular course of your business? A. Yes, sir.

Q. When you say you sent them to the company, where did you send them?

A. To our main offices in Glendale.

Q. Mr. Austin, I exhibit to you Government's Exhibits Nos. 1, 2, 3, 4, 5, and 6 for identification and ask you to [12] examine the checks and state whether or not those are checks given to you, signed by Mr. Fly, as you have described during the course of your testimony? A. Yes, they are.

Q. I believe you stated it was your custom to go by Mr. Fly's place of business or one of his places of business, and pick up the checks. Were the invoices which constitute the other part of these Government

(Testimony of William H. Austin)

exhibits, Nos. 1 to 6, inclusive, made out at the same time the check was picked up in all instances?

A. No, sir; they were not.

Q. How did that happen?

A. The invoices were made out at the time the sugar was actually picked up, delivered and picked up.

Q. And the check might have been given at some other time? A. Yes, sir.

Q. Now, looking at the second portion of Government's Exhibits Nos. 1 to 6, inclusive, will you state whether or not those are the records which were made and kept in the regular course of your business as you have testified? A. Yes, sir.

Mr. Bell: The Government offers these in evidence as Government's Exhibits 1 to 6, inclusive.

Mr. Carr: I would like, your Honor, and I had better [13] preface my objection with the realization that I, for a long time, have known that possibly it is not good procedure to object on the ground that the first seven counts do not state an offense, but since we have been changing the rules so fast I think I am going to adopt the objection that, and objection of these on the ground that counts 1 through 7, both inclusive, do not state an offense.

The Court: Unless you particularize more—

Mr. Carr: I will take that up fully at the time of my motion.

The Court: That motion does not lie. That is what they call a "speaking demurrer." It does not lie under the new one and I do not permit it under the old one.

Mr. Carr: But I would like to have it go in the record that way.

The Court: All right, the objection is overruled.

(Testimony of William H. Austin)

(The documents heretofore marked as Plaintiff's Exhibits 1 to 6, inclusive, were received in evidence.)

Q. By Mr. Bell: In the case of all these checks, Mr. Austin, did you deposit them, as you said you deposited the first one? A. Yes, sir.

Mr. Bell: You may cross examine. [14]

Cross Examination

By Mr. Carr:

Q. Your name is Mr. Austin—did I understand you correctly? A-u-s-t-i-n? A. Yes, sir.

Q. How long have you worked for the Smart & Final Company? A. Since the early part of 1944.

Q. As a matter of fact, Mr. Austin, you had this conversation in July. You say you had it in person with Mr. Fly. You had it on the telephone, didn't you?

A. No, I did not.

Q. Where were you when you had the conversation?

A. In my store at Fairfax and Melrose, Unit W.

Q. You are sure of that? A. Yes, sir.

Q. Don't you recollect you first had that conversation on the telephone and you later met Mr. Fly, about a month later? A. No, sir.

Q. Was that the first time you had ever talked to Mr. Fly? A. In regard to sugar, yes.

Q. Had you ever talked to him previously? [15]

Q. Had you ever talked to him previously?

A. Well, I have known Mr. Fly since 1944, at which time I was manager of Unit 63 for Smart & Final at Vermont and Santa Monica.

Q. He had purchased commodities from you previous to that time? A. That is right.

(Testimony of William H. Austin)

Q. As a matter of fact he had purchased sugar from you and given you checks, hadn't he?

A. Small amounts for his grocery, yes, sir.

Q. Gave you checks, did he not?

A. Yes, sir.

Q. And those checks were cashed at the bank, were they not?

A. As far as I know they were.

Q. And you knew that Mr. Fly, from your own knowledge, you knew that Mr. Fly had an account at the Bank of America. Santa Monica and Vermont Branch, did you not?

Mr. Bell: Objected to as calling for a conclusion of the witness.

The Court: Overruled.

Q. By Mr. Carr: Did you of your own knowledge know he had an account at the Santa Monica and Vermont Branch of the Bank of America, a ration account?

A. Yes, sir. [16]

Q. As a matter of fact he gave you checks on that account prior to these checks, and I am speaking now beginning with Government's Exhibit No. 1, which is dated November 11, 1946. He had given you checks on that same bank ration account—checks previous to that time, hadn't he?

A. He had about a year before. I was in the Army about a year.

Q. And those checks had gone through and cleared, hadn't they?

A. Yes.

Mr. Bell: Objected to as calling for a conclusion of this witness.

The Court: Objection overruled.

(Testimony of William H. Austin)

Q. By Mr. Carr: You say they did clear?

A. I don't know whether they did or not.

Q. You didn't get a call from the bank, did you?

A. No.

Q. Now, when these did not clear did you hear from the bank? A. No.

Q. How did you find out that these did not clear?

A. I didn't know that those hadn't cleared. Otherwise I would not have kept selling the sugar.

Q. But you do know that previous to November 11, 1946, you had received at least several checks. sugar ration [17] checks from Mr. Fly?

A. At least a year before that time I had taken some.

Q. And you never heard from those checks again, did you? A. No.

Q. Now, I want to ask you if you have ever been out to any of Mr. Fly's stores and restaurants?

A. Yes, sir, I have.

Q. Do you know what names appear on the signs or how they are labeled on the outside? Was it the "Italian Delicatessen" or just what appears on the sign?

A. On the Sunset store I believe it is "Italian-American Delicatessen".

Q. And the word "Import" appears on there too, does it not? A. To my knowledge no, it doesn't.

Mr. Bell: I will object to this as incompetent, irrelevant and immaterial. This is not a competent way of proving the man had a bank account in that name.

The Court: Objection overruled.

Q. By Mr. Carr: You have been in his place at 4356 Sunset, haven't you? A. Yes, sir.

(Testimony of William H. Austin)

Q. And it is a fact, isn't it, it appears out there in the form of a sign "Italian and American" and under it [18] the word "Groceries"?

A. I believe so.

Q. And under that the words "Wines-Delicatessen". Do you remember those words appearing there?

A. I believe so.

Q. Now, over at 8279 Santa Monica—you have been to that place, too, haven't you? A. Yes, sir.

Q. And on that it appears "Hollywood Italian-American Delicatessen"? A. I don't know.

Q. Well, the point I am getting at is in dealing with Mr. Fly you knew that he was the proprietor of both those places, didn't you? A. Yes, sir.

Q. And isn't it a fact, Mr. Austin, that prior to November 11, 1946, you did receive some checks instead of being made out and signed as Exhibit No. 1 is signed, they were signed "Italian-American Delicatessen" by Mr. Fly. Do you remember those checks? A. No.

Q. You think that all of them were signed "Italian-American Import Company"?

A. As far as I can remember they were.

Q. I note on your office copy of—what do you call [19] this attached to Exhibit 1 here? How do you designate that piece of paper?

A. That is our original invoice. In other words, our office copy.

Q. And a copy of this invoice would go to the customer is that right? A. Yes.

Q. And I notice it is just made out to James M. Fly Cafe at 28—is that 88? A. That is 2880.

Q. Riverside. So you knew at the time you were dealing with a sole proprietor, to-wit, James Fly?

(Testimony of William H. Austin)

A. Yes, sir.

Mr. Bell: Objected to as calling for a conclusion of the witness and I move it be stricken.

The Court: All right.

Mr. Carr: If you want me to qualify him I will do it.

Q. By Mr. Carr: You used to work for Mr. Fly, didn't you? A. Yes, sir.

The Court: I don't think this is proper cross examination. If you want to use him as your own witness you may do so later on.

Mr. Carr: Very well, your Honor.

Q. By Mr. Carr: By the way, you have not been charged [20] in any case in connection with this offense, have you? A. No, sir.

Q. And in no Federal Court are you now charged with any offense in connection with these checks?

A. No, sir.

Q. Approximately how much did you receive from Mr. Fly in connection with these checks?

Mr. Bell: Objected to, your Honor. There is no testimony of any kind that he received anything.

Mr. Carr: I am testing the man just as you do any witness on cross examination.

The Court: Yes, go ahead.

The Witness: I didn't receive a thing from Mr. Fly except the check for the 10,000 pounds of sugar and the check for \$858 or \$811, whichever the OPA price happened to be for the sugar.

Q. By Mr. Carr: You never got anything for yourself? A. No, sir.

Q. Isn't it a fact that you got approximately \$1,500 from Mr. Fly? A. No, sir, it is not.

(Testimony of William H. Austin)

Q. You deny under oath that you ever got a nickel?

A. I do.

Mr. Carr: That is all.

The Court: All right, call your next witness. [21]

Mr. Carr: May I recall this witness for just two questions. He is still here.

The Court: Yes.

Q. By Mr. Carr: What was the address, sir, of the store in which you worked for Smart & Final?

A. At which I work now?

Q. No, where you worked at the time these checks were given to you. A. 726 North Fairfax.

Q. And you picked the checks up, all of these checks over where? At Mr. Fly's place of business?

A. Yes.

Q. What was that address?

A. His cafe on Riverside Drive. I don't know the exact address.

Q. Why did you go all the way over there to pick up these checks?

A. Because I was told to do so, to order the sugar for him and come by and pick up the checks. It is my business to promote business.

Q. You didn't have any trouble selling sugar at that time, did you? A. A certain amount of it.

Mr. Carr: That is all. [22]

Redirect Examination

By Mr. Bell:

Q. Was that on your way home?

A. Yes, sir; it was on my way home in Glendale.

Mr. Bell: That is all.

The Court: Call your next witness.

Mr. Bell: Mr. Honigs.

DAVID HONIGS,

a witness called as a witness by the Plaintiff, being first sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: David Honigs.

Direct Examination

By Mr. Bell:

Q. What is your occupation, Mr. Honigs?

A. Baker.

Q. Do you know Mr. Fly? A. Yes, sir.

Q. Did you say yes? A. I do.

Q. How long have you known him?

A. Well, I would say about six months or so.

Q. Did you know him—when did you first meet him? [23]

A. Well, I wouldn't know the exact date but around, oh, about October, the latter part of October.

Q. October, 1946? A. Yes.

Q. Where did you meet him?

A. At his place of business.

Q. Will you keep your voice up?

A. His place of business.

Q. And where is that?

A. On Riverside Drive.

Q. Did you have a conversation with him?

A. Well, rather short conversation.

Q. Well, I mean on the occasion when you first met him did you have a conversation—did you talk to him?

A. Yes, sir.

Q. Was anyone else present? A. No.

Q. Do I understand that that was sometime in the latter part of October of 1946 that you are talking about?

A. Yes.

(Testimony of David Honigs)

Q. Will you relate the conversation that you had?

A. Well, just merely that I asked him if I could—knowing that he had extra sugar—

Q. Just state what you said to him and what he said to you. [24]

A. Well, if it was possible for me to get a little sugar for my place of business and he said it was, so I asked him if I could have 50 sacks, which was 5,000 pounds, and he wrote the check for it.

Q. Pardon me. Did all the jurors hear the last answer?

A Juror: No, I didn't.

Mr. Bell: Would you read the answer, Mr. Reporter?

(Answer read.)

Mr. Bell: I would like to have the check marked 7 for identification.

(The document referred to was marked Plaintiff's Exhibit 7 for identification.)

Q. By Mr. Bell: I show you a check marked Government's Exhibit 7 for identification and ask you if you can recognize that as the check he handed to you on that occasion? A. I believe so.

Q. Did he make it out in your presence?

A. Yes.

Q. After he made it out what did he do with it? Strike that. What happened after that?

A. Nothing.

Q. Keep your voice up.

A. I paid him and took the check.

(Testimony of David Honigs)

Q. You paid him what? How much did you pay him? [25]

A. I don't remember the exact amount. It was \$18.50 a hundred.

Q. Was that for the check or was that for the sugar?

A. The check, the points.

Q. After you received this check what did you do with it? A. Well, then I gave it to the salesman.

Q. What was his name?

A. His name was Walsma.

Mr. Bell: We offer No. 7 in evidence, your Honor.

The Court: It may be received.

(The document referred to was marked Plaintiff's Exhibit No. 7 and admitted in evidence.)

Mr. Bell: You may cross examine.

Cross Examination

By Mr. Carr:

Q. Mr. Honigs, is it Honigs? A. Yes, sir.

Q. Weren't you charged in connection with these transactions in some case up here in the Federal Court?

A. Yes.

Q. What did you do? Enter a plea of guilty?

A. Yes, sir.

Q. Have you already been sentenced? [26]

A. Yes, sir.

Q. How much did you say you gave Mr. Fly?

A. I don't remember the exact amount. That is \$18.50 per hundred.

(Testimony of David Honigs)

Q. Isn't it a fact that is what you were telling somebody else you paid?

A. That is what I did. I got the sugar for myself.

Q. You were telling him you were paying \$18.50 so you could add some profit?

A. No, sir.

Q. You were not getting any profit yourself?

A. No, sir; that sugar was for myself, for my own use.

Q. You used the sugar yourself?

A. Yes, sir.

Q. You did not sell any of it?

A. No, sir.

Q. And how much did you say you paid Mr. Fly?

A. \$18.50.

Q. Per hundred?

A. Yes, sir.

Q. What was sugar selling for at that time?

A. I don't remember. I believe it was \$6.50 or \$7.50. I believe it was \$6.50 a hundred.

Q. Why do you look at the prosecutor when you are saying that? [27]

A. I am not looking at the prosecutor. I am just looking in general. I believe it was \$6.50 a hundred.

Q. Has the prosecutor talked to you about this case?

A. He reviewed the facts with me.

Q. I assume you told him nothing but the truth?

A. Yes, sir, exactly.

Q. And the prosecutor told you, of course, to tell nothing but the truth?

A. That is right.

Mr. Carr: That is all.

The Court: Call your next witness.

Mr. Bell: Mr. Walsma.

HENRY WALSMAS,

called as a witness on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Henry Walsma.

Direct Examination

By Mr. Bell:

Q. What is your occupation, Mr. Walsma?

A. Salesman.

Q. For what company?

A. Bakers Purchasing Company. [28]

Q. You are also president of that company, are you not?

A. Yes, sir.

Q. Will you answer audibly, please?

A. Yes, sir.

Q. Do you know Mr. Honigs?

A. Yes, sir.

Q. Did you ever receive a check from Mr. Honigs for sugar?

A. I received a check for sugar, yes, sir.

Q. I show you Government's Exhibit 7 which appears to be a check made out to Bakers Purchasing Company for five thousand pounds of sugar and signed "Italian Import Company, James M. Fly." Is that the check you received from him?

A. Well, I wouldn't say just exactly that is the check but I received a couple or three checks from him.

Q. Does that appear to be one of the checks?

A. That appears to be one of the checks, sir.

Q. What did you do with the check after you received it?

A. I brought it into the office.

Q. The office?

A. Yes, sir.

(Testimony of Henry Walsma)

Q. Of the Bakers Purchasing Company? [29]

A. Yes, sir.

Mr. Carr: Which exhibit is that?

Mr. Bell: This is No. 7. That is all.

Cross Examination

By Mr. Carr:

Q. W-a-l-s-m-a, is that right? A. Yes, sir.

Q. Are you the salesman for the Bakers and Confectioners? A. No, Bakers Purchasing Company.

Q. You bought the check from the man, Mr. Honigs?

A. I didn't buy the check.

Q. How did you get it? A. Given to me.

Q. He just gave you the check?

A. He gave me the check.

Q. Why did he give you Government's Exhibit No. 7? Here is a check for five thousand pounds of sugar. Just tell us why he gave it to you.

A. (No answer.)

Q. Why did he give you that check?

A. Well, sir, the check he gave me because the Bakers Purchasing Company name is on it and the fellows who made arrangement with him told me this check was made out [30]—he told me this check was made out to the Bakers Purchasing Company and wanted to get some sugar for it.

Q. Do you know who got the sugar on that check?

A. No, I don't, sir, not particularly on this check?

Q. Well, what connection then did you have with the check? How did you happen to get it?

A. Well, because I was the salesman. I called on Mr. Honigs once a week. I come there and he said.

(Testimony of Henry Walsma)

“Henry, I have got a check here for you.” I represent the Bakers Purchasing Company and of course, naturally, I take the check.

Q. You don’t know who got the sugar? You sold it but you don’t know who got it?

A. Well, maybe I know some of the fellows got some sugar but I wouldn’t say particularly this check.

Q. You were not charged in any case yourself, were you? A. Yes, sir.

Q. Did you plead guilty, too? A. Yes, sir.

Mr. Carr: That is all.

Mr. Bell: No further questions. Mrs. Appel, will you take the stand, please? [31]

ALMA APPEL,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Alma Appel.

Direct Examination

By Mr. Bell:

Q. What is your occupation, please?

A. (No answer.)

Mr. Bell: I would like to have the clerk mark what appears to be a ration deposit slip and a sheet from an account book as Government’s Exhibit 7-A and 7-B, for identification.

(The documents referred to were marked as Plaintiff’s Exhibits 7A and 7-B, for identification.)

(Testimony of Alma Appel)

Mr. Carr: Will you tell me what they are, just generally?

Mr. Bell: I will show you 7 and 7-B for identification.

Q. By Mr. Bell: What is your occupation, Mrs. Appel? A. Office manager.

Q. Will you keep your voice up so everyone on the jury can hear you? [32] A. Office manager.

Q. For what company?

A. For the Bakers Purchasing Company.

Q. Do you know Mr. Walsma? A. Yes, sir.

Q. Mr. Walsma who just left the stand a few minutes ago? A. Yes, sir.

Q. Do you know Mr. David Honigs?

A. Not until I met him today.

Q. In your duties as office manager do you keep the records for the company? A. No, not directly.

Q. Well, are they under your custody in any way?

A. The whole office is, yes.

Q. What I mean is, are the records kept under your custody? A. Yes, sir.

Q. And is it the regular course of your business to make and keep records of the transactions of your business? A. I don't think I understand your question.

Q. Well, in the regular course of your business do you make records of sales and purchases and accounts?

A. Oh, surely.

Q. And do you make those at or near the time of the [33] transaction they pertain to? A. Yes, sir.

Q. I want to show you Government's Exhibit 7 for identification and 7-B for identification and ask if either

(Testimony of Alma Appel)

or both of those were kept under your custody in the regular course of business as you have described?

A. Yes, they appear to be.

Q. Now, have you seen Government's Exhibit 7 before? A. Not to my knowledge.

Q. The Bakers Purchasing Company which appears thereon as payee, is that your company? A. Yes.

Mr. Carr: That is objected to. The check speaks for itself. She cannot explain the face of the check.

Q. By Mr. Bell: And do you know who made out 7-B?

A. I wouldn't know exactly who made it out, no.

Q. Will you describe just what 7-B is? What do you call it in your business?

A. It is a rationing record of receipts of ration evidence and disbursement of deliveries.

Mr. Carr: I can't hear you.

A. It is a record of the receipts of ration evidences and deliveries against those particular evidences.

Q. By Mr. Bell: And when you speak of "ration evidences" you refer to ration checks? [34]

A. Yes, sir.

Q. Does your company, the Bakers Purchasing Company, have a sugar ration account or did it during 1946?

A. Yes.

Q. Did you make deposits in that account?

Mr. Carr: Object to that as being immaterial.

Mr. Bell: This is a record. It is simply a foundation.

The Witness: Employees of our firm made the records, yes.

(Testimony of Alma Appel)

Q. By Mr. Bell: When you made the deposit did you make a ration deposit slip?

A. Ration deposit slips were made.

Q. Did you keep a carbon of those?

A. Yes, sir, we did.

Q. And is Government's Exhibit 7 such a ration deposit slip, carbon copy?

A. Yes, it appears to be.

Mr. Bell: We offer Exhibit 7-A and Exhibit 7-B in evidence.

Mr. Carr: Objected to as being wholly immaterial Does not prove or disprove any issue involved in any of the counts.

Mr. Bell: May I ask that 7 be considered in connection with those? It may assist your Honor to have one line pointed out in the record which she described as the receipt [35] of ration evidence.

The Court: Which one?

Mr. Bell: Does counsel care to see the line I have in mind?

Mr. Carr: No, that is all right. Just point it out.
Mr. Bell. I don't quite get the purpose.

The Court: I think the purpose, as I see it, is to show, not only by the check but by the endorsement on the check, that this sugar check was honored and that is also shown by a record which she kept in the regular course of business. It is to show that it was actually honored and the transfer of sugar made.

Mr. Bell: That is correct and these trace it.

The Court: And this one so indicates.

Mr. Carr: I will withdraw the objection if that is the purpose of it.

(Testimony of Alma Appel)

The Court: Exhibit 7 is the check actually signed as the Italian-American Import Company by James M. Fly and—

Mr. Carr: I think we are just wasting your Honor's time.

The Court: All right, they may be received in evidence.

(The documents referred to were marked as Plaintiff's Exhibits 7-A and 7-B, and were received in evidence.)

Mr. Bell: That is all. [36]

Mr. Carr: That is all.

The Court: Call your next witness.

Mr. Bell: Mr. Ripley.

FRANK A. RIPLEY,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Frank A. Ripley.

Direct Examination

By Mr. Bell:

Q. What is your occupation, Mr. Ripley?

A. Store manager for Smart & Final Company, Unit 65.

Q. Were you so occupied in the latter part of 1946?

A. I was.

Q. And more particularly during October 1946?

A. Yes.

Q. Did you say Unit 65? A. Yes, sir.

Q. How long were you so engaged there at Unit 65?

A. I have been in that store for seven years.

(Testimony of Frank A. Ripley)

Q. Did you sell and dispose of sugar at that store?

A. Yes, sir.

Mr. Bell: I would like to have the clerk mark for identification what appears to be an invoice and two checks. [37]

(The documents referred to were marked as Plaintiff's Exhibit 8, for identification.)

Q. By Mr. Bell: I hand to counsel for the defendant a copy of Plaintiff's Exhibit 8 and ask the clerk to mark for identification another check and another invoice.

The Clerk: Plaintiff's Exhibit 9 for identification.

(The documents referred to were marked as Plaintiff's Exhibit 9, for identification.)

Mr. Bell: I show No. 9 to counsel for the defendant and ask the clerk to mark another check and another invoice for identification.

The Clerk: That is Government's Exhibit 10 for identification.

(The documents referred to were marked as Plaintiff's Exhibit 10, for identification.)

Mr. Bell: I show it to counsel for the defendant and ask the clerk to mark for identification another check and another invoice.

The Clerk: Plaintiff's Exhibit No. 11 for identification.

(The documents referred to were marked as Plaintiff's Exhibit No. 11, for identification.)

(Testimony of Frank A. Ripley)

Mr. Bell: I show Exhibit No. 11 to counsel and ask that the clerk mark for identification another check and another invoice. [38]

The Clerk: Government's Exhibit 12 for identification.

(The documents referred to were marked as Plaintiff's Exhibit No. 12, for identification.)

Q. By Mr. Bell: Mr. Ripley, when you disposed of, or dispensed sugar, did you receive any kind of ration evidence for dispensing such sugar?

A. Yes, we always received ration checks.

Mr. Bell: I show No. 12 to counsel for the defendant.

Q. By Mr. Bell: When you sold sugar and received a check therefor, did you make any record for your own company of the sale?

A. Made out a sales invoice similar to what you have there—just identical to that.

Q. I will ask you to look at Government's Exhibits 8 to 12, inclusive and say whether or not those are the type of invoices and those are the type of checks that you received at your unit?

A. Yes, those are checks and invoices that were made out in our store.

Q. The invoices were made out at your unit?

A. Yes.

Q. And were any of them made out by you?

A. Yes, No. 8, No. 11.

(Testimony of Frank A. Ripley)

Mr. Carr: We are wasting time, it seems to me.

Mr. Bell: We will offer them in evidence, Exhibits 8 [39] to 12, inclusive.

Mr. Carr: Other than that general objection, your Honor, that I made earlier and which your Honor referred to as a "speaking demurrer", I would like to renew that with respect to these exhibits.

The Court: That is a grand old term.

Mr. Carr: I am familiar with it but I don't want your Honor to feel I am making this without a serious reason for making it.

The Court: I understand your point. The objection is overruled. Exhibits 8 to 12, inclusive will be admitted in evidence.

(The documents referred to were marked Plaintiff's Exhibits 8 to 12, inclusive and received in evidence.)

Mr. Bell: No further questions. You may cross examine.

Cross Examination

By Mr. Carr:

Q. You never saw this man before in your life, did you? A. No.

Mr. Carr: That is all.

Mr. Bell: No further questions.

Mr. Carr: Let the record show I pointed to Mr. Fly. [40]

The Court: All right. Call your next witness.

Mr. Bell: Mr. Olsen.

NATHAN ELI OLSEN,

called as a witness on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Nathan Eli Olsen.

Direct Examination

By Mr. Bell:

Q. During the year 1946 what was your occupation, Mr. Olsen?

A. My occupation—I was manager for Smart & Final, cash and carry, 1826 Sunset Boulevard.

Q. Do you know Mr. James Fly, the defendant here?

A. Yes, I do.

Q. How long have you known Mr. Fly?

A. Well, to say exactly it would be rather difficult.

Q. Roughly?

A. It goes back before the war. Oh, I would say about 1940.

Q. About 1940? A. Yes, sir.

Q. During 1946 did you sell Mr. Fly any sugar? [41]

A. I did.

Q. Did you have any conversation with Mr. Fly in connection with the sale to him of sugar?

A. Well, to make any direct statement actually—being a salesman and making my living on a commission naturally every customer is a potential prospect for my business and I believe conversations is a good means by increasing business.

Q. Did you have a conversation with him or conversations with him?

A. Well, limited conversations.

(Testimony of Eli Olsen)

The Court: A conversation as the lawyer means is merely did you talk to him?

The Witness: Yes, your Honor.

The Court: Anything other than saying how do you do or good morning is a conversation or talking. That is what he means.

Q. By Mr. Bell: Well, did you have any conversation with him in connection with these sales of sugar that you say you made to him? A. Yes.

Q. Do you remember any particular conversation?

A. Well, the one that sticks out prominently in my mind is the fact that sugar took a slight advance, oh, sometime thereabout—I mean when I was managing that cash [42] and carry it went up. It was 10 cents or 15 cents on a hundred pounds of sugar.

Q. Can you fix the approximate date, the month?

Mr. Carr: Of what? The conversation or the increase in the price of sugar?

Mr. Bell: I mean the conversation.

The Witness: The month?

Q. By Mr. Bell: I understood you to say you had the conversation about the time there was an increase in the price of sugar.

A. Well, it was shortly thereafter—I mean right thereabouts.

Q. Do you remember then when the rise in the price of sugar took place? A. Not exactly, Mr. Bell.

Q. Well, was it the early part of 1946 or the latter part? A. It was somewhere in the middle of 1946.

Q. About the middle of 1946? A. Yes, sir.

Q. Where did the conversation take place?

A. At the store.

(Testimony of Eli Olsen)

Q. Was anyone else present?

A. There might possibly have been in the store—there could have been anywhere from 20 people on down. [43]

Q. Well, do you remember in—you say the conversation that stands out in your mind—what is your best recollection as to who was present?

A. I believe it was just the both of us or there could have been more—there could have been somebody else wandering around the store.

Q. Do you remember anybody there listening to the conversation? A. No, sir.

Q. Well, will you relate the conversation?

A. Well, word for word I couldn't relate it. However, it—

Q. Just give us the substance of it.

A. The substance of it I could relate was the fact that sugar had slightly advanced 10 or 15 cents.

Q. Did somebody say that?

A. I am relating the fact that it had and there was a squawk made, I mean, as to the price.

Q. Well, did Mr. Fly say that? A. Mr. Fly—

Q. Well, try to identify the speaker if you will, Mr. Olsen.

A. Well, sugar went up as you know. I mean in business, in the grocery business a nickel is quite a little bit on any item and because sugar had gone up and it was a [44] little bit more the squawk was made that there was no profit in it and to pay that additional 10 or 15 cents—in other words it was the bunk.

(Testimony of Eli Olsen)

Q. Did he say that to you?

A. Well, he said that he wished he had known before; that he would liked to have had it at the old price.

Q. What else was said that you recall?

A. Well, just about that business was lots of work and no profit.

Q. Well, did you sell him any sugar?

A. Yes, sir, I did.

Q. When you sold him sugar did you receive from him any ration evidence? A. Yes, sir, I did.

Q. What did you receive? A. A signed check.

Q. And do you recall how they were made out?

A. To Smart & Final Company for whatever the poundage may have been for the individual sale and signed by, I believe, James M. Fly.

Mr. Carr: Just a moment. I object to the witness relating what the instruments purport to show, your Honor. The instruments speak for themselves.

The Court: That is correct.

Mr. Bell: We will show your Honor that these particular [45] instruments were destroyed.

The Court: Well, you should show that first.

Q. By Mr. Bell: Do you recall how the signature appeared?

Mr. Carr: If the court please, I think counsel should show that they disappeared and that the records are not in existence.

The Court: First of all he has to show it is an instrument traceable to the defendant and the only way he can do it is by showing that.

Mr. Bell: Do I understand the witness may answer the question?

(Testimony of Eli Olsen)

The Court: Yes.

Q. By Mr. Bell: What appeared at the bottom by way of signature or maker?

A. The signature of the maker was James M. Fly.

Q. Do you recall anything else?

A. Italian-American Importing Company.

Q. Italian-American Importing Company?

A. Yes.

Q. Will you keep your voice up, please?

A. I am sorry. The signature was James M., I believe, Fly, Italian-American Importing Company.

Q. Do you recall on how many occasions, approximately, you sold to Mr. Fly? [46]

Mr. Carr: I object to all this. It doesn't go to prove any issue in this case. It is prejudicial. It confuses the issues in the case.

The Court: Let us confine ourselves for the present at least, to the counts in the indictment. You have 12 counts and let us not bring in any outside matters. Later on we will determine, if similar transactions are offered on the subject of intent, whether it is admissible. I will pass on that matter at that time.

Q. By Mr. Bell: Do you recall any other conversations, other than the one that you related a few minutes ago, with Mr. Fly? A. Well, directly—

Q. Did you have any talk with him about anything in connection with these sales?

A. Well, about all that it would have amounted to, which I believe would have been to the extent that I was interested in more business for the store of all types of business.

(Testimony of Eli Olsen)

Q. By way of refreshing your memory do you recall asking him what he was doing with the sugar?

Mr. Carr: If the court please, I do not think there is any basis for refreshing the witness' recollection at this particular point. As a matter of fact, I am going to move to strike all the testimony of this witness, his testimony [47] being wholly without the issues of the case and not proving or disproving any issue in the indictment, and is working to the prejudice of this defendant.

The Court: Well, the motion will be denied but I will sustain the objection to the question last asked.

Q. By Mr. Bell: Do you recall any other conversations that you had with him?

A. Yes. I believe a remark was made that—I questioned—I mean not only in this instance but practically instance—

Mr. Carr: If the court please, I have to object to what he questioned.

Mr. Bell: I think he is merely objecting to the phraseology of the witness in the use of the word "questioning". I assume he means—

Mr. Carr: I am not assuming anything.

The Court: Let the witness' language speak for itself. The jury can interpret what he means. Go ahead.

The Witness: In conversing it seems that I recollect a conversation that was in part—whether it was in part or total one time or at another or several times—when you dig back a year you can't exactly lay your hands on it but to the point that in the business of handling sugar was bulk, tremendous low profit such as there was in the—certainly wasn't a very great business. [48]

(Testimony of Eli Olsen)

Q. By Mr. Bell: Who said that?

A. Mr. Fly.

Q. Do you recall anything further that Mr. Fly said to you?

A. Exactly and precisely possibly there could have been.

Mr. Bell: No further questions.

Mr. Carr: At this time I move to strike all the testimony of this witness on the ground that it does not prove or disprove any issue in the case. My second ground is that it was offered, apparently, for the purpose of proving similar incidents and it is not sufficiently connected up or relevant to prove that particular phase and I move to strike all of his testimony. I think it is prejudicial in its present state.

The Court: If I felt this testimony tended to show similar transactions I would allow the testimony to remain but instruct the jury that it goes only to intent because the offenses under the first seven counts have to be done willfully and knowingly and anything that goes to prove intent is admissible, but I do not think it is sufficiently connected to indicate anything but general palaver and was not even a conversation.

I will strike the testimony and instruct the jury to disregard it. Call your next witness. [49]

Mr. Bell: Mr. Eltinge.

V. N. ELTINGE,

called as a witness on behalf of the Plaintiff, being first sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: V. N. Eltinge.

Direct Examination

By Mr. Bell:

Q. What is your occupation, Mr. Eltinge?

A. Branch manager of the Bank of America at Santa Monica and Vermont.

Q. How long has that been your occupation?

A. Since January, 1942.

Q. Have you made a search of the records of your bank to ascertain whether or not there is an account or, during 1946 there was an account for sugar under the name of the Italian-American Import Company?

A. Yes.

Q. Did you find such an account in your bank?

A. No.

Q. Have you checked the files and records of your bank to ascertain whether or not there is a sugar ration—whether there was a sugar ration banking account in your [50] branch under the name of James M. Fly?

A. Yes, sir.

Q. Was there such an account? A. No.

Q. I exhibit to you Government's Exhibits 1 to 12 inclusive and call your attention to the check which constitutes portions of those exhibits. Have you see those checks before, Mr. Eltinge? A. Yes, sir, I have.

Q. Where did you see them before?

A. Well, I saw them in the bank there. Mr. Taylor brought them in.

(Testimony of V. N. Eltinge)

Q. At your bank at Santa Monica and Vermont?

A. Yes, sir.

Q. When you say Mr. Taylor brought them in, did he bring them into your office or bring them into the bank?

A. No, they were brought to my attention. They were in the bank.

Q. They were in the bank?

A. Came through, yes.

Q. Did you obtain them from the files there or did somebody else obtain them?

A. Well, they were from our files in the bank.

Q. Do you know of your own knowledge who got them from your files? [51]

A. Well, I don't really recall whether I picked them out or one of my assistants.

Q. Did you turn them over to somebody?

A. Yes. I turned them over to Mr. Taylor.

Q. Mr. Eltinge, did you also search the files to ascertain whether or not there was a sugar ration banking account in the name of the Italian-American Delicatessen Company?

A. Yes, sir.

Q. And did you find such an account? A. Yes.

Q. Do you know a man by the name of Fred Peterson?

A. Yes, sir.

Q. Did he ever work for you? A. Yes, sir.

Q. What was his position in your bank?

A. He was assistant cashier and chief clerk.

Q. Did you know a man by the name of Gordon Smith?

A. Yes, sir.

Q. Did he work for you? A. Yes, sir.

(Testimony of V. N. Eltinge)

Q. What was his position?

A. The same. He took Peterson's place.

Q. Did those men work for you during 1946?

A. Yes, sir. [52]

Q. You said that Mr. Smith took Mr. Peterson's place. Did they ever work in the bank at the same time?

A. Yes, they did.

Q. When did Mr. Peterson leave the bank entirely or did he just transfer in some way?

A. Mr. Peterson was there and resigned and then we gave Gordon Smith his position there.

Q. Do you recall the approximate date that took place?

A. That was in—I have a record of it here if I may look at it.

Q. To refresh your memory?

A. Yes. Peterson resigned on September 30, 1946. At that time Gordon Smith took over his position.

Mr. Bell: That is all, you may cross examine.

Cross Examination

By Mr. Carr:

Q. Mr. Eltinge, how long have you known Mr. Fly?

A. Oh, I have known Mr. Fly—I couldn't say exactly.

Q. Well, approximately will do.

A. Three or four years, I believe.

Q. He banks at your bank, does he not?

A. He did.

Q. And used to be in and out of there quite a bit?

A. Yes. [53]

(Testimony of V. N. Eltinge)

Q. Depositing money, taking money out and probably even borrowing money, wasn't he, from time to time?

A. Yes. He didn't borrow any from me but he had from other branches, I believe.

Q. And as a matter of fact—first I will ask you this: Have you ever been over to his place of business at 4356—let me see if I have that right, 4356 Sunset?

A. Yes.

Q. And approximately how many times have you been in that place of business?

A. Oh, once or twice, I believe.

Q. You knew that that place was being operated by James Fly as sole proprietor, did you not?

A. Yes, sir.

Q. Have you ever been over to his place on Santa Monica, 8279?

A. No—well, I went there one night to look for Peterson and that was the only time I was in there. That was after—that was about 7:00 o'clock at night. Something came up I wanted to talk to Peterson about.

Q. Now, the address at 4356 Sunset you recall has on the outside: "Italian-American Delicatessen"?

A. Yes.

Q. And as a matter of fact Mr. Fly had an account, a ration account there for a considerable period of time, [54] didn't he, prior to 1946?

A. Yes, sir.

Q. And you know of your own knowledge, that some of those checks were labeled—I should not say "labeled" but signed "American Delicatessen" by James M. Fly and they were cashed, weren't they?

A. Yes, sir.

Q. And on this same account we have been referring to?

A. Yes.

(Testimony of V. N. Eltinge)

Q. But the account was not carried in the name of the Italian-American Import Company?

A. That is right.

Q. You knew, of course, that James Fly owned both of those businesses, is that correct? A. Yes, sir.

Q. And as a matter of fact if he had had in that account, Mr. Eltinge, sufficient ration credit those checks would have been cashed, is that right?

A. Well, I think if I may say this, that was a mistake of the bookkeeper to ever pay those checks signed that [55] way.

Q. But they were paid?

A. They were paid, yes.

Q. Now, if the checks had come in Italian-American Import Company signed by James M. Fly and there had been sufficient credit in the bank, ration credits, they would have been cashed, wouldn't they?

A. I would not have cashed them but I didn't know about it.

Q. They were being cashed under those circumstances? A. Yes.

Q. You don't have with you, do you, the ration deposit account, the papers that were taken from the bank?

A. No. What few we could find were turned over to Mr. Taylor. They were destroyed, the records that we hunted for.

Q. Who destroyed the records?

A. Well, I don't like to say but they were evidently destroyed.

Q. Well, I don't think there is any great sin about telling us, Mr. Eltinge. I think it might help throw some light on the case.

(Testimony of V. N. Eltinge)

The Court: That is if you know.

The Witness: Well, I have my reasons to believe but I have no actual knowledge that they were destroyed. [56]

Q. By Mr. Carr: If you have no actual knowledge I don't want you to speculate. Could you estimate—did you see the account before it was destroyed?

A. Yes; I had seen it at various times.

Q. And could you tell me whether or not it had a balance in it at the time it was destroyed?

A. Well, just what do you mean by that?

Q. Well, I mean he had credit—in other words a credit could have been issued on the account?

Mr. Bell: Is this account of the delicatessen?

Mr. Carr: This is James M. Fly. I am not particular whether it is the delicatessen or American Import or whatever it is so long as we are talking about the account on which James M. Fly drew checks.

A. Dell, on November 30 approximately, at the time we found out this business, there was 1,330 pounds on the account.

Q. And at the time it was destroyed I assume that would be the same situation?

A. Well, the records and the checks for approximately a year—way back, had been destroyed so we wouldn't check back.

Q. The last time you saw—first let me ask you this. What papers would have been in the hands of the bank prior to the time they were taken away? You would have a signature [57] card?

A. Yes, signature card, ledger sheets.

Q. And 'cancelled checks? A. That is right.

(Testimony of V. N. Eltinge)

Q. Now, to whom did you give the cancelled checks?

A. They would be held out but they were taken from our records, the cancelled checks.

Q. By whom?

A. Well, by one of the employees.

Q. By one of your employees?

A. That is right.

Q. Well, now, what happened then to the ledger sheet? A. They also disappeared.

Q. Didn't the OPA come over there and pick up the papers, agents of the OPA, a Mr. Foster and Mr. Taylor or somebody from the OPA?

A. Mr. Taylor was around but the record we could find were only a few of what we should have had.

Q. Well, what records did Mr. Taylor take away with him? That is what I am getting at.

A. Well, he got one ledger sheet, I believe, and he got a number of other sheets as well.

Q. Do you have the ledger sheet, counsel?

Mr. Bell: No. What happened was this. This was taken over by the Department of Agriculture when the OPA went out [58] of existence, and we have been trying all day to get the documents so we can use them, but they have been mislaid somewhere.

Mr. Carr: That is as bad as when the Supreme Court was having the argument and the rule was in the pocket of a marshall in Texas and they couldn't find it. I ask this witness be excused subject to recall.

Mr. Bell: That is quite all right with us. We are still endeavoring to get those records from the Department of Agriculture.

The Court: All right, call your next witness.

Mr. Bell: Those documents also have a bearing on the testimony of the next witness and if we find them I would like to have the witness come back tomorrow so he can talk about those records.

The Court: All right.

Mr. Bell: Mr. Carle.

JACKSON T. CARLE,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Jackson T. Carle. [59]

Direct Examination

By Mr. Bell:

Q. During 1946, Mr. Carle, what was your occupation?

A. I was employed by the Office of Price Administration and subsequently by the sugar rationing administration as branch director for Southern California and Arizona.

Q. In connection with sugar what were your duties?

A. My duties were to generally supervise and direct the administration of the sugar rationing program in this area.

Q. Did you have anything to do with the registration of persons seeking sugar allotments?

A. Yes. The branch office here received registrations and kept them on file, authorized the opening of ration bank accounts; determined allotment inventories and so on.

Q. Did you have under your custody all the registrations in this area of people authorized to have ration bank accounts?

A. Yes.

(Testimony of Jackson T. Carle)

Q. Did you make a search of your records under your control to ascertain if there was a registration in the name of the Italian-Import Company? A. I did.

Q. Did you ascertain whether or not there was such [60] a registration?

A. There was no such registration for the Italian-American Import Company either as an authorized dealer or consumer of sugar or for bank account.

Q. Did you make a search of your records to determine whether or not there was such a registration in the name of James M. Fly?

A. There was a registration in the name of James M. Fly doing business as the Italian-American Delicatessen in the 4300 block on Sunset Boulevard. [61]

Q. Was there any in his own name other than that?

A. No.

Q. Do you know where that particular set of records is now?

A. The sugar branch office turned those records over to the division of special investigation of the sugar rationing administration.

Q. And is that agency now in existence?

A. No; the sugar branch office was closed on July 7th of this year and sometime subsequent to that, around the end of July, the division of special investigation was also closed down.

Q. And do you know where those records went to from there?

A. I don't know where this particular record went to. The records in general of pending cases were turned over to the alcohol tax unit.

(Testimony of Jackson T. Carle)

Q. That is the Treasury Department?

A. Yes, sir. I am sorry, I said Agricultural Department, Mr. Carr. May I amplify that a little? The general registration records were turned over to the Department of Agriculture; pending cases were turned over to the alcohol tax unit.

Mr. Bell: Then I wasn't so far wrong after all. Now, rather than ask this man to testify what he remembers this [62] document to contain I am going to ask that he be recalled tomorrow in the event those documents are found.

The Court: All right.

Mr. Carr: Do you want me to cross-examine him now?

Mr. Bell: Whatever you wish.

Cross-Examination

By Mr. Carr:

Q. I take it, sir, you would be considered an expert on matters of the OPA relating to sugar, is that right?

A. I have some knowledge of the machinery of sugar rationing, yes.

Q. And you were familiar with the machinery and how it did work at that time, say in 1946?

A. Yes, sir.

Q. Now, calling on your knowledge as an expert let us ask you this question: You say Mr. Fly was registered and that the Italian-American Delicatessen Company was registered. Now, your records would show that his account was at the branch of the—at the Santa Monica and Vermont Avenue Branch of the Bank of America, is that right?

A. The records show where the account was, yes.

(Testimony of Jackson T. Carle)

Q. Well, you know that in this case that was the place where the account was, don't you?

A. Not to my present knowledge, no.

Q. Then the records or the registration would show [63] his business address, is that right? A. Yes.

Q. Now, if a check were presented to that bank and it was written by James M. Fly and it came from his business address isn't it a fact that under normal operations the bank cashed all of those checks although the name of the concern might have been slightly different? For instance in one case it might be the Italian-American Delicatessen and in the other case it might be the Italian-American Import Company?

A. No, that is not true.

Q. They would not do that? A. No.

Q. Did you know that just prior to your taking the witness stand the branch manager of the bank said that they were actually cashing checks under those circumstances?

Mr. Bell: Objected to as calling for the conclusion of the witness.

The Court: And furthermore, I don't think that states the answer of the witness fairly. The witness said that the bookkeeper did it but they had no business doing it. You remember that?

Mr. Carr: That is the point in this case. The point is that they didn't mean to but they did it.

Q. Isn't it a fact, Mr. Witness, that in many, many [64] instances, with the knowledge of the officials of the OPA, that where a man is the sole proprietor and using a trade name, that checks were actually cashed to your

(Testimony of Jackson T. Carle)

knowledge and nothing was done about it, although the name of the concern was not accurate?

A. That is not a fact.

Q. It is not a fact? A. No, sir.

Q. Now, what was the balance, if you know, in that account when it was closed? A. I don't know.

Q. Have you any way of finding out?

A. No, I have no way of finding out now. I think the bank could give me the answer to that.

Q. Well, I will show you a letter here and I will ask this be marked for identification as Defendant's Exhibit 1. I think it is a registered letter. Probably the envelope and the interior should be marked as separate exhibits.

The Clerk: Defendant's Exhibits 1 and 2, for identification.

(The documents referred to were marked as Defendant's Exhibits 1 and 2 for identification.)

Q. By Mr. Carr: Mr. Witness, I will show you here first Defendant's Exhibits 1 and 2, which is an envelope [65] marked "Registered, 973509," with a United States postage stamp on it and on the left-hand corner it says: "Office of Price Administration, Postoffice Box No. 3549, Terminal Annex, Los Angeles 54, California. That was your postoffice box, was it not? A. Yes, sir.

Q. It says, "Official Business." If undeliverable as addressed please return to sender. You recognize that as one of your envelopes, do you not?

A. Yes, sir. [66]

Mr. Carr: Do you raise any question about that, counsel? Do I have to lay the foundation?

Mr. Bell: I won't raise any question about the fact the letter is drawn from the envelope.

(Testimony of Jackson T. Carle)

Q. By Mr. Carr: I show you then Defendant's Exhibit A-1, which is the enclosure in that envelope and you will note that at the top it says "Office of Temporary Controls, Office of Price Administration, Los Angeles, Sugar Branch. P. O. Box 30549, Terminal Annex, Los Angeles 54, California." That was the way your letters of this type were headed, is that right?

A. That is right.

Q. Do you recognize this as one of your letters?

A. Yes, sir.

Q. Now, in that connection you will note it is addressed to the Italian-American Delicatessen, 4356 Sunset Boulevard, Los Angeles, California, dated February 10, 1947.

Mr. Bell: Just a moment. I will object to the further reading of any contents until it is offered in evidence.

Mr. Carr: Well, I will offer it in evidence at this time, your Honor, both exhibits.

Mr. Bell: And I will object to it as being beyond the scope of the direct examination and as incompetent, irrelevant, and immaterial. [67]

The Court: I do not think sufficient foundation has been laid to warrant the introduction of this letter—not in the sense it didn't originate from the OPA but in the sense that the American-Delicatessen had an account.

Mr. Carr: Your Honor, he testified relating to whether or not they had an account and he says he doesn't know what the balance is. I am taking what he has admitted to be one of the official records of the OPA—he admitted it was sent by the OPA. Now, I am offering it to show what the balance in that account was by the very letter which came from the OPA.

(Testimony of Jackson T. Carle)

Mr. Bell: There is no foundation showing this man had anything to do with it or that it reached the defendant or anything of the sort.

The Court: I think for the present I will sustain the objection. Later on in the light of any additional testimony I might change my ruling.

Mr. Carr: Well, I would like to lay a little bit of foundation then to be sure before I make the offer.

Q. By Mr. Carr: Did I understand you, sir, to say that Exhibit A-1, Defendant's Exhibit A-1 you recognize to be a letter which was sent from the OPA—Office of Temporary Controls, rather, the successor of the Office of Price Administration, to the Italian-American Delicatessen at 4356 Sunset Boulevard? [68]

A. I recognize the letter in question as being a form letter which was sent by the branch office in cases involving the closing of accounts because of overdrafts.

Q. And from your experience and knowledge of the operation of the OPA and the Office of Temporary Controls, you know that this is the type of letter that was sent out to close accounts? A. Yes, sir.

Mr. Carr: I offer it, your Honor, in evidence, both the exhibits, Exhibit 1-A and 2-A.

Mr. Bell: I renew my objection on all grounds.

The Court: Well, the ruling will stand. You may renew your offer later.

Q. By Mr. Carr: Now, I will show you Defendant's Exhibit A-1 and ask you if you can look at that and refresh your recollection and tell me what the balance was in the account, of the American-Delicatessen—Italian-American Delicatessen at 4356 Sunset Boulevard on April 10, 1947?

(Testimony of Jackson T. Carle)

Mr. Bell: Object to it as incompetent, irrelevant and immaterial, what the American-Italian Delicatessen Company had in its account. That is not the charge at all. It is the checks drawn on the import company.

Mr. Carr: Our position simply is this. Mr. Fly, the evidence has shown, is the sole proprietor of one or the other, if there were two, and as such the evidence is [69] admissible to show whether or not he had an account. Your Honor, the allegations in the indictment are that there was no such account, either Fly or the other account, and certainly we cannot preclude a defendant from showing that he actually had an account. The testimony has shown, whether it be right or wrong, that the bank was cashing the checks written on the Italian-American Delicatessen and the mere slip of a finger or the use of a different name should not condemn a man for eternity. He should have a chance to show that.

Mr. Bell: I do not believe that is a correct statement of the evidence. The questions put on that score was what certain individuals dealt with him as or understood him to be.

The Court: I think while in some respects it is a little out of order, I will leave the testimony that the man had an account, actually had an account under a different name.

Let us get away from this case for a moment and illustrate the situation a little differently. The jurors will understand anything I say is not a comment on the facts. I never comment on the facts, but whenever a point is made I believe it is the duty of the court not merely to rule on it but to tell the basis for the ruling. Sometimes I am able to convince counsel that my ruling is right and

(Testimony of Jackson T. Carle)

they [70] conform to it and sometimes they convince me that I am wrong.

Let us illustrate here. It is one thing for a man to give a check on the bank where he has no account and it is another thing to give a check on a bank where he does have an account but uses the wrong name. Supposing it is a partnership account and he uses his individual name. In the one case the inference of intent would be absolute because a man is supposed to know whether he has an account or not. In the other case there is an inference of acting in good faith that can easily be drawn because the man may just have made a mistake. Certainly if he had an account he could draw against it. It is a question for the jury to determine whether the mistake was deliberate in order to secure additional sugar or the result of a mistake. The law does not punish mistakes in any instance and I believe that any testimony which would show that at the time these checks were drawn he actually had an account, if connected up, may bear upon the intent when the other name was used.

That is one of the fundamentals in a proceeding of this character. You have to show it was willful and knowingly done. You know the definition I usually give of willfulness and willingly done. Therefore good faith or bad faith is material and the defense against bad faith is just as broad as the attack on it. In fact it is narrower. If the defendant succeeds in convincing the jury or raises a [71] reasonable doubt in the juror's mind as to whether this was a deliberate attempt to get advantages to which he was not entitled, to get additional sugar to which he was not entitled and was the result of a mistake and that he did not gain or profit by it because he had plenty of

(Testimony of Jackson T. Carle)

sugar under another name, it is up to the jury then to apply the doctrine of reasonable doubt. The defendant does not have to prove that beyond a reasonable doubt or even by a preponderance of the evidence. I am not saying that this has that effect. I am merely saying it bears upon that point. What weight is to be given it is for the jury to determine in the light of the entire record—the entire evidence.

Mr. Carr: I was merely asking him if he could refresh his recollection from that Exhibit A-1 and from that tell what the balance was in the account on February 10, 1947.

The Court: You may answer that question.

The Witness: This form letter addressed to the Italian-American Delicatessen would indicate that the account was closed on February 5 because of a prior overdraft, because checks had been written against it in excess of the balance in the bank, but by the time the closing came up it showed a credit balance of 1,490 pounds.

Mr. Carr: That is all. I would like to offer these. I believe your Honor has sustained the objection on the offer for the moment. That is all for the present. I have no [72] further examination.

Mr. Bell: I have further examination but I would like to see if we can get the documents first and we would like to have this witness recalled tomorrow morning.

The Court: All right. Gentlemen, we have reached the end of the day. We have worked long hours and this is a good stopping point. You are moving along very fast.

Ladies and gentlemen of the jury, we are about to take an adjournment until 10:00 o'clock tomorrow morning. The court admonishes you not to converse among your-

(Testimony of Jackson T. Carle)

selves or with anyone else on any subject connected with the trial, or to form or express an opinion thereon until the cause is finally submitted to you.

When you return in the morning you will go to the jury room and remain there until called by the bailiff.

I try to get on the bench promptly but I am acting in three different capacities at the present time. I am trying criminal cases, I am also in charge of the criminal department and I am also acting as senior judge in the absence of Judge McCormick. The result is that all sorts of things are coming up that need action. That is a part of my work and rather than have people wait until I am off the bench, especially when it relates to the liberty of an individual, whether he should be admitted to bail or not or revocation of probation, I have to take the time to hear them when all the parties are [73] present.

I want to impress upon you in this and in other cases, it is of the utmost importance to keep an open mind as to the facts in the case. You have already heard some of the testimony on behalf of the plaintiff. An entirely different interpretation of that testimony may be had after the defendant has produced his witnesses. That being true you will have to then decide, if a conflict arises between the testimony of various witnesses, which version you are to believe. It is a matter entirely up to the jury, a matter which I have nothing to do with except to give you certain rules by which to judge the credibility of witnesses.

With that admonition in mind we will adjourn until 10:00 o'clock tomorrow morning.

(Whereupon, at 4:45 o'clock p. m., a recess was had until 10:00 o'clock a. m. of the next day, Wednesday, September 24, 1947.) [74]

Los Angeles, California, Wednesday, September 24, 1947,
10:00 A. M.

The Court: Call the case, Mr. Clerk.

The Clerk: United States of America versus James M. Fly.

Mr. Carr: Defendant is ready.

Mr. Bell: The Government is ready, your Honor.

The Court: Let the record show the jurors are in the jury box and the defendant is in court with his counsel. You may proceed, gentlemen.

Mr. Bell: May it be stipulated the jury is here?

The Court: I have already said that. You did not hear me.

Mr. Bell: I am sorry, your Honor.

The Court: Call your next witness.

Mr. Bell: Mr. Tingle.

BENJAMIN H. TINGLE,

called as a witness by the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Benjamin H. Tingle.

Direct Examination

By Mr. Bell:

Q. What is your occupation, Mr. Tingle? [78]

A. I am an investigator with the Alcohol Tax Unit, Internal Revenue Bureau.

Q. In that capacity were you given custody or possession of any documents from the Office of Price Administration, the Sugar Control Branch?

A. Yes, sir; we took custody of those.

(Testimony of Benjamin H. Tingle)

Q. Were you given custody of any documents and records pertaining to a person by the name of James M. Fly?

A. Yes, sir. We took over the files, all the files from that office in which that case was included.

Q. Are those files and records in your possession now?

A. Well, we have the regular file, the regular case file in that case but we were unable to find the file containing the exhibits in that case.

Q. Have you made a search of your office for those records? A. We have.

Q. What has been the extent of your search?

A. We made a thorough search of all our records and files. We have been unable to find them.

Q. Did you do anything further?

A. We also telephoned our San Francisco office to make a further search for the case and we were told that they would make such a search and let us know about it.

Q. Have you received any communication from them? [79]

A. No. They told us if they found any records—

Mr. Carr: I can't hear you, Mr. Witness.

A. They told me if they found the records they would send them to us special delivery today.

Q. By Mr. Bell: Did you make any personal examination of the contents of the exhibit file?

A. No, I did not.

Mr. Bell: That is all.

Mr. Carr: That is all.

The Court: Call your next witness.

Mr. Bell: Mr. Taylor, will you take the stand?

LAWRENCE M. TAYLOR,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Lawrence M. Taylor.

Direct Examination

By Mr. Bell:

Q. What is your occupation, Mr. Taylor?

A. At the present time I am a salesman.

Mr. Carr: I don't know, but there is something about this position over here that makes it impossible for me to hear the witness. I have good ears, your Honor. I can usually hear my wife talk a mile away but I can't hear these [80] witnesses.

The Court: We all do that.

Q. By Mr. Bell: Were you at one time associated or employed by the Office of Price Administration?

A. Yes, sir.

Q. In what capacity? A. Special agent.

Q. During what period of time were you so employed?

A. July 1945 to July 1947.

Q. Among your assignments did you investigate Mr. Fly? A. Yes, sir.

Q. In the course of that investigation did you pick up and collect documents and exhibits of various sorts?

A. Yes, sir.

Q. Will you describe briefly the exhibits you picked up?

A. Well, we had checks that had been cleared through the bank that we received from the bank.

(Testimony of Lawrence M. Taylor)

Q. Which bank?

A. Bank of America, Santa Monica and Vermont Branch.

Q. Did you see Mr. Eltinge there? A. Yes, sir.

Q. Did you see Mr. Snodgrass there?

A. Yes. [81]

Q. What else did you pick up?

A. We have statements of all types from different people that we contacted regarding the case.

Q. Did you put into your exhibit file any registration statements of the Office of Price Administration?

A. Yes, sir; the original—all of the original applications and orders that were issued to and for the Italian-American Delicatessen.

Q. And were these the records which had been on file in Mr. Carle's office? A. Yes, sir.

Q. After you picked them up what did you do with those documents?

A. They were initialed and put in a safe in our office, in an envelope, a large Manila envelope which was bound with a rubber band and then it was sealed with Scotch tape on the outside with my initials on them.

Q. What was the last date on which you saw that exhibit file? A. July 23rd, 1947.

Q. How do you fix that date?

A. Because that was the last day I worked for the Agricultural Department. I went through the files at that time.

Q. By that time the Agricultural Department had taken [82] over your unit? A. Yes, sir.

Mr. Bell: I believe that is all of this witness.

The Court: Cross examine.

(Testimony of Lawrence M. Taylor)

Cross-Examination

By Mr. Carr:

Q. Who are you working for now?

A. The Lanser Company.

Q. You are not with the Government any more?

A. No, sir.

Q. When did you leave the Agricultural Department?

A. July 23rd, 1947.

Q. When did you leave the OPA?

A. At the end of the time that the Agricultural Department took over the office of temporary controls.

Q. As I understand it, the office of temporary controls took over OPA and office of temporary controls was taken over by the Agricultural Department and now you are back in private business? A. Yes, sir.

Mr. Carr: That is all.

Mr. Bell: In view of our inability to produce these documents I think we had better proceed on the basis of secondary evidence of them, your Honor, so I will call Mr. Eltinge back to the stand. [83]

V. N. ELTINGE,

called as a witness by and on behalf of the plaintiff, having been previously duly sworn, was recalled and testified further as follows:

Direct Examination (Resumed)

By Mr. Bell:

Q. You have heretofore been sworn in this case?

A. Yes, sir.

Q. Mr. Eltinge, yesterday you were testifying as to the records in your bank concerning the account of Mr.

(Testimony of V. N. Eltinge)

Fly. I believe you stated that you had an account in your branch bank under the name of Italian-American Delicatessen Company, is that right? A. Yes, sir.

Q. Do you now have the signature card for that account in your possession?

A. I am not positive of that. Mr. Snodgress may have that with his papers.

Mr. Bell: That makes it necessary for me to call Mr. Snodgress. I will have to recall this witness again, your Honor. Will you call Mr. Snodgress?

The Court: All right, you may stay in the room.

Mr. Bell: Your Honor, while we are waiting for this witness may I hand the court a decision which I would like to have your Honor read when you get a moment because I am going [84] to refer to it. It may save time. It is 160 Fed. (2d) 259.

The Court: All right.

Mr. Bell: I want to ask Mr. Eltinge one more question.

The Court: Very well.

Q. By Mr. Bell: Mr. Eltinge, do you know whether or not that document is in your possession or in the possession of your bank.

Mr. Carr: I can't hear you, Mr. Bell.

Q. By Mr. Bell: Do you know whether the signature card is in your possession or the possession of your bank at the present time? A. It is not.

Q. Do you know where it is?

A. It was given to Mr. Taylor along with the other papers.

(Testimony of V. N. Eltinge)

Q. Did you see the signature card when it was in the possession of your bank? A. Yes, sir.

Q. Will you describe how the signature card appeared?

A. It was made out to the Italian-American Delicatessen by James Fly, I believe, or Jimmy Fly.

Q. Do you recall whether there was just Mr. Fly on it or whether anybody else had authority to sign?

A. No one else that I know of had authority to sign on there. [85]

Mr. Bell: That is all.

Mr. Carr: Just a moment, Mr. Eltinge.

Cross Examination

By Mr. Carr:

Q. You are the manager of the bank there, aren't you?

A. Yes.

Q. What if anything did you have to do with ration accounts? A. Beg your pardon?

Q. What if anything did you have to do with ration accounts there at the bank?

A. I opened up a great many of them.

Q. You didn't do that personally, did you?

A. Yes, I did.

Q. You handled those personally?

A. Yes, sir, we had to. We were short of help during the war and it necessitated me doing lots,—lots of things.

Q. Did you personally open the account for Mr. Fly?

A. No, I did not.

Q. Are you quite sure that you saw the signature card that Mr. Fly signed? A. Yes, I did.

(Testimony of V. N. Eltinge)

Q. When?

A. When Mr. Taylor was out we checked everything.

Q. And you looked yourself at the card? [86]

A. Oh, yes.

Q. Have you checked since Mr. Taylor left to find out if any of the records might have been left inadvertently?

A. Yes, sir, we have.

Q. And you can't find a thing?

A. No further records.

Q. I take it the only thing you ever saw in connection with Mr. Fly's account was the signature card?

A. No. We have, I beg your pardon, we have copies of ledger sheets and other copies. Mr. Snodgrass has them here now.

Q. You have copies of them?

A. Certified copies.

Q. Of some of the material you gave to Mr. Taylor?

A. That is right.

Q. What do you mean by "certified?" Certified by whom?

A. Certified as correct.

Q. By whom?

A. By one of the officers of the bank.

Q. You mean from their recollection?

A. Not from recollection, no. They were made up at the time these papers were given to Mr. Taylor.

Q. In other words, you keep a duplicate copy?

A. That is correct. [87]

Q. So you should have a duplicate copy of everything?

A. Everything that we gave Mr. Taylor, yes.

Q. That is fine; that is all.

Mr. Bell: No further questions. Now, Mr. Snodgrass.

RICHARD C. SNODGRESS,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Richard C. Snodgress.

Direct Examination

By Mr. Bell:

Q. What is your occupation, Mr. Snodgress?

A. I am assistant cashier and chief clerk of the Santa-Monica-Vermont Branch of the Bank of America.

Q. Will you keep your voice up?

A. Assistant cashier and chief clerk of the Santa Monica and Vermont Branch of the Bank of America.

Q. How long has that been your occupation?

A. I have been at that branch since December 16th of 1946.

Q. In connection with your duties there did you encounter Mr. Taylor of the OPA? A. Yes, sir.

Q. Did you turn over any documents to him? [88]

A. Yes, I did, sir.

Q. When you turned over the documents to him did you make or cause to be made any duplicates or copies thereof? A. Yes, I did, sir.

Q. Have you checked the files of the branch bank there of the Bank of America, to ascertain if those duplicates were there? A. Yes, sir.

Q. Have you found any ledger sheets of the Italian-American Delicatessen Company?

A. Yes, sir, I have.

(Testimony of Richard C. Snodgress)

Q. Do you have those with you?

A. Yes, sir, I do.

Q. May I see the ledger sheets, please?

Mr. Bell: The witness hands me three ledger sheets which I would like to have the clerk mark for identification as one number.

The Clerk: Government's Exhibit 13 for identification.

(The document referred to was marked as Plaintiff's Exhibit 13, for identification.)

Q. By Mr. Bell: Not being an accountant, Mr. Snodgress, I would like to have you explain what these various entries are. On the first page there appears a group—

Mr. Carr: I will object to that until a better foundation is laid and the thing is identified.

Mr. Bell: Well, we will offer it in evidence.

Mr. Carr: I object to it on the ground, first of all, it has matter on the face of the first page that is written on there which is a conclusion and which is prejudicial or might be prejudicial. Upon the further ground that it is not yet proved that this is an absolutely accurate copy. There seems to be some handwriting. There are several marks on it. It appears to have been added to and there are brackets around certain figures. And on the further ground that the foundation has not been properly laid.

Mr. Bell: That was the process I was trying to bring out when counsel interrupted me.

The Court: Go ahead.

(Testimony of Richard C. Snodgress)

Q. By Mr. Bell: Did you compare the copy here with the documents that you turned over to Mr. Taylor? A. This, sir, is the original sheet.

Q. You are pointing to the first sheet?

A. This first sheet.

Q. The first sheet is a duplicate original?

A. No, this is an original sheet. This posting was actually done on this sheet. This is the original. I posted this top sheet.

Q. By Mr. Bell: The whole sheet or just a portion of the sheet? [90]

A. This down to this point.

Q. You are pointing down to the bottom of that top pencilled bracket there? A. That is right.

Q. Some figures inside of a rectangle and you are pointing to the bottom line of that rectangle?

A. Yes, sir.

Q. Down to that point it is the original sheet?

A. Yes, sir.

Q. Now, will you describe what the other figures here represent? I am pointing to the lower half of the sheet and the two left-hand columns.

A. These two columns are where the amounts of the checks which were deducted in the upper part of the sheet have been added back to the ledger.

Q. And this typewritten material in the lower right-hand portion, was that written at the time that you turned the material over to Mr. Taylor?

A. Yes, sir. I typed that on there myself.

(Testimony of Richard C. Snodgrass)

Q. Now, calling your attention to the second sheet, are those original entries or are those copies of the documents that you gave to Mr. Taylor?

A. That is a duplicate of the previous ledger—the ledger that was previous to this one, you see.

Q. The second sheet is a sheet which was previous to sheet No. 1, is that right? Is that what you mean to say? [91]

A. That is right. This is the copy. This is a copy of the ledger which was previous to this one.

Q. And the third page, what does that represent?

A. This is the account, the ledger of the account subsequent to the first sheet.

Q. So the regular order should be—the middle sheet is No. 1, the top sheet is No. 2 and this sheet is No. 3?

A. Yes, that is correct.

Q. Now, except for the first half of the—strike that. When you say this middle page is a duplicate you mean that is a carbon copy made at the time of the original or was it made subsequently?

A. That would be made subsequently according to this statement here—a certified copy.

Mr. Carr: I object to that answer. We are asking for his knowledge and not according to the statement.

Q. By Mr. Bell: Did you compare—

Mr. Carr: I move that be stricken.

The Court: It may be stricken.

Q. By Mr. Bell: Did you compare the middle sheet here with any of the documents you gave to Mr. Taylor?

A. This particular sheet I don't think I had anything to do with.

(Testimony of Richard C. Snodgress)

Q. Where it says "Certified copy," is that Mr. Eltinge?

A. That is Mr. Eltinge's signature. [92]

Q. Now, as to the third sheet. Did you compare that with any document that you gave Mr. Taylor?

A. No. This sheet was retained. This is an original sheet which was retained in our file. It was not given to Mr. Taylor.

Q. So the top sheet and the bottom sheet were not given to Mr. Taylor, is that right? A. That is right.

Q. And these are not copies but they are originals or what you call originals? A. Yes, sir.

Q. And the middle sheet is one that you are not certain about, is that correct?

A. That would be a copy.

Mr. Bell: Before going further, because I wish to offer this into evidence, I would like to call Mr. Taylor to testify to the court sheet.

The Court: Very well.

LAWRENCE M. TAYLOR,

called as a witness by and on behalf of the plaintiff, having been previously duly sworn, was recalled and testified further as follows:

Direct Examination (Resumed)

By Mr. Bell:

Q. You have already been sworn, Mr. Taylor? [93]

A. Yes, sir.

Q. I believe you testified that you picked up some documents from Mr. Eltinge and Mr. Snodgress at the Bank of America? A. Yes, sir.

(Testimony of Lawrence M. Taylor)

Q. I show you the second page of Government's Exhibit 13 for identification, upon which appears the signature L. M. Taylor. A. That is my signature.

Q. Did you receive a copy of that document?

A. Yes, sir.

Q. Did you compare the copy that you received with the document that appears here? A. Yes, sir.

Q. The document that you received was original in form, was it? A. Yes, sir.

Q. At the time and before taking it away and while both were present you compared them, is that right?

A. Yes, sir.

Q. At the time and before taking it away and while both were present you compared them, is that right?

A. Yes, sir.

Q. Did they correspond in all respects?

A. Yes, including the pencil marks on the sheet.

Q. Now, which pencil marks do you refer to?

A. These here.

Q. You are indicating some pencil marks under the [94] column "old balance" and the column "new balance"? A. Yes, sir.

Mr. Bell: That is all from Mr. Taylor.

Mr. Carr: Should I cross-examine him? I am coming and going here, your Honor.

The Court: Let him complete his direct examination.

Mr. Carr: I will be in the wrong courtroom in a few minutes the way it is going. Shall I wait until he is recalled?

The Court: Yes, I think so.

Mr. Bell: You can step down at this time, Mr. Taylor. Mr. Snodgress, will you resume the stand?

RICHARD C. SNODGRESS,

called as a witness by and on behalf of the plaintiff, having been previously duly sworn, was recalled and testified further as follows:

Direct Examination (Resumed)

By Mr. Bell:

Q. Now, as to these documents which we have been describing here and talking about, Exhibit 13, were those records made and kept in the regular course of your business? A. Yes, sir.

Q. And was it the regular course of your business to make and keep such records? A. Yes, sir. [95]

Q. Was it the regular course of your business to make and keep such records at or near the time of the transaction they purport to reflect? A. Yes, sir.

Mr. Bell: Government's Exhibit 13 is offered in evidence.

Mr. Carr: I would like, before I make an objection, to ask him a few questions on voir dire.

The Court: All right.

Cross-Examination

By Mr. Carr:

Q. You were not working at the bank at the time these records were made, were you?

A. I was working at the bank from about the middle of the first page on.

Q. About the middle of the first page on?

A. Yes.

Q. Now, let us get that exactly.

A. All right. I went to work at the bank on December 16th. This posting from this point on, was done after I was at the bank.

(Testimony of Richard C. Snodgrass)

Q. From about where? Where it says—the first figure, \$2500.00?

A. Yes, that is correct, sir.

Q. The rest of the postings you were at the bank when [96] done? A. Yes, sir.

Q. Now, how about page 2? Were you there when that was done?

A. To my knowledge, no. I don't know.

Q. How about page 3? Were you there when that was done? A. Yes, sir.

Q. So, part of page 1 you were not there and page 2 you were not there, and you think you were there on page 3? A. I know I was there on page 3.

Q. All right, you know you were there. Now, these figures are of a lighter hue than the later ones?

A. That is right.

Q. Which shows, according to your testimony, they were treated as original—that was an original up to about half of the page?

A. That is right, sir, but the hue of the type does not—isn't what decides that.

Q. What does decide whether half of the page is original and half is duplicate?

A. Because this part—this is not so much of a duplicate as it is a correction of the posting up here. You see, this is the original posting. This is a reversal of [97] that posting.

Q. This reversal came about after you talked to Mr. Taylor, didn't it? A. Yes, sir.

(Testimony of Richard C. Snodgrass)

Q. And you wrote this writing on there after you had a discussion with Mr. Taylor?

A. That is right, sir. I talked to him before I did that.

Q. So this writing on here is not a part of your ordinary books and records at all? It is just something you put on after Mr. Taylor came in and talked to you?

A. No, sir. I put that on there when I made this correction because in—

Q. Now—

Mr. Bell: Let him answer the question.

Mr. Carr: Just a moment, counsel. I submit your Honor—well, go ahead.

The Witness: Well, what I wanted to say was, any time that I make a correction on an account I always put an explanation of what that correction is.

Q. By Mr. Carr: Your correction was based on what Mr. Taylor told you, is that right?[98] A. Yes.

Q. Let us make a mark on this sheet showing the division of the first page between the portion which we consider the original and that portion which you consider your corrected part. Will you mark a line across it? Now, at the top that was the original record and the bottom is the corrected part?

A. That is correct, sir.

Mr. Carr: I am going to object to the document on the ground, especially to the first page, your Honor, that that would be a conclusion of this witness and it would not be binding on this defendant at all. It is not shown to be a part of the regular bookkeeping and I object to its introduction in evidence. In fact, I object to the whole

(Testimony of Richard C. Snodgress)

exhibit on the ground it has not been shown to be accurate and the foundation has not been properly laid to place it in evidence in lieu of the original. And on the further ground it is not material to the issues in this case and it might work to the prejudice of this defendant.

The Court: I will allow the typewritten portion at the top of the first page to be covered up by the clerk.

Mr. Carr: How about the figures that were put on as a result of his talk with Mr. Taylor?

The Court: I think the testimony is sufficient.

Mr. Carr: May I make one further objection on the ground that it is a self-serving proposition and that it is not [99] binding on this defendant—the figures at the bottom of that page.

The Court: Well, the objection is overruled. The clerk will cover that portion up that I indicated.

The Clerk: Government's Exhibit 13 in evidence.

(The document referred to and previously marked as Government's Exhibit 13, was received in evidence.)

Mr. Carr: Shall I go on with my cross examination?

Mr. Bell: I have some questions on direct.

Redirect Examination.

Q. By Mr. Bell: Are you familiar, Mr. Snodgress, with the procedure in posting an account such as appears in Government's Exhibit 13? A. Yes, sir.

Q. I recall your attention to the column at the left, "old balance," and the column at the right, "new bal-

(Testimony of Richard C. Snodgrass)

ance." Is there any procedure by which the figures in one are transferred to the other?

A. Yes, sir. For each posting you pick up that as you place it in your machine, the balance that shows in the new balance column, strike your motor bar on your machine, which puts it in the balance column called "old balance."

Q. Now, I call your attention to the second page and to those particular entries opposite which there is a pencil mark on the second line in the right-hand column, "new balance." There is a figure of 591 and there is a pencil [100] mark and the third figure in the old column is a pencil mark 691, and there is a pencil—will you explain how it appears that in the new balance it is 5 and the old balance it is 6? A. That is a bookkeeping error. The bookkeeper should have picked up 591 and picked up 691.

Q. Now, does this same sheet contain any corrections of that error?

A. Yes, sir; here is the correction.

Q. And you are pointing to the fifth and sixth entries in the old balance column? A. That is right.

Q. The fifth one reading 691 and the sixth one reading 691 or 591. Is that right? A. That is right.

Q. Now, did you find any other records of the balance or the account—records of the Italian-American Delicatessen Company in your bank?

A. At this time, you mean?

Q. No, I mean did you—calling your attention to the time when Mr. Taylor called at your bank, I believe in December 1946, did you search your files and records thoroughly? A. I did;

(Testimony of Richard C. Snodgrass)

Q. Did you find any other records other than these or [101] the originals of these which constitute Government's Exhibit 13?

A. Well, I found some checks which I turned over to Mr. Taylor.

Q. I mean balance sheets of this type?

A. No, sir, there were none.

Q. Now, as I say, I would like to have you explain further, a little further and a little more clearly what these figures at the top of the first sheet represent. There is a group of figures there. What do they indicate?

A. These figures?

Q. Yes.

A. Those are the individual amounts of checks which were deducted from the balance of the account.

Q. And that is under the column which you have checks, is that right? A. Yes, sir, that is right.

Q. And you said something about reversing them down below here in the lower half in the two left-hand columns? A. That is right.

Q. Now, what do you mean by "reversing"? What is that process?

A. When the checks are deducted it reduces the balance. When we reverse that we add back the amounts of those checks nullifying the original posting. [102]

Q. Now, on this first page, about the middle of the page, just above the wavy line which I believe you drew here at Mr. Carr's suggestion, there is a line under date and new balance which reads 47, January 15, 143,692,

(Testimony of Richard C. Snodgress)

and I believe there is an O.D. at the right. What does that indicate?

A. That would indicate the account was overdrawn by that amount.

Q. By 143,692 pounds? A. Yes, sir.

Mr. Bell: That is all. You may cross-examine.

Recross-Examination

By Mr. Carr:

Q. Now, Mr. Snodgress, you went to work with the Bank of America at what date?

A. August 16th, 1939.

Q. 1939? A. Yes, sir.

Q. Previous to that time did you work for Mr. Fly?

A. No, sir.

Q. You never worked for him, did you?

A. No, sir.

Q. Did you know Mr. Fly? A. No, sir.

Q. And when did you go to the Santa Monica and Vermont [103] Branch? A. December 16, 1946.

Q. And when did you ever become acquainted—strike that. Did you ever become acquainted with Mr. Fly?

A. No, sir.

Q. Would you know him if you saw him?

A. No, I don't believe so.

Q. Now, you just asserted—I notice on the right-hand column here it says "Date" in print. First it says, "Deposit, Date, New Balance." The first figure is 1,730. Is that a balance or is that an overdraft?

A. That is a balance.

(Testimony of Richard C. Snodgrass)

Q. Now, in the same column it says "47, January 15, 143,692." You told Mr. Bell that was an overdraft. Why would that appear in that column?

A. Well, whether the balance is overdrawn or whether it is a good balance, it still appears in the same column but the distinction is that on an overdraft there is O.D. printed after the figures.

Q. Where is the O.D. on this one?

A. Right there.

Q. Is that supposed to be an O.D. there?

A. Yes, sir.

Q. Who put the O.D. on there?

A. The machine automatically prints it. [104]

Q. If there was an overdraft of 143,000 on that date why did you recompute the figures?

A. Because the checks did not belong in the account.

Q. Oh, you took the checks off of this account?

A. They were delivered to the OPA.

Q. Then there wasn't any overdraft of 143,692, is that right?

A. That is right. If those checks didn't belong there there wouldn't be the overdraft.

Q. So that figure is incorrect, isn't it? A. Yes.

Q. Now, I don't see any dates. I call your attention to these figures at the top of sheet one where, for example, at the top it says, "1,730 old balance—" under old balance, "1,730." That means pounds, I take it?

A. Yes, sir.

(Testimony of Richard C. Snodgress)

Q. Then there is a figure five thousand dash seventeen hundred. I see no date there at all to indicate when that transaction occurred.

A. The date of all the checks that are posted in one posting appears when you total the machine out. All those checks would be posted on this date, December 4, 1946.

Q. Now, as a matter of fact, when a check cleared the bank, a ration check, you kept the check, did you not? You did not send it back to the customer? [105]

A. That is right.

Q. So he never saw his checks again after they once came into the bank?

A. He could pick up a statement.

Q. I understand, but the checks he never saw again?

A. He could ask for a return of his check with the statement.

Q. In the course of the general practice they were not returned, is that right?

A. Not unless they were specifically asked for, no.

Q. The general practice was not to return them, am I correct? A. Yes.

Q. And how often, sir, if you know, would you destroy those checks or how would you get rid of the cancelled checks?

A. They would be kept in the file indefinitely.

Q. Didn't you have a period when they were transferred to the OPA or destroyed or something happen to them?

A. No. At the close of rationing they ordered us to send out statements to all the customers.

(Testimony of Richard C. Snodgrass)

Q. Well, do I understand that you accumulated all of the checks there in the bank and held them for the whole period, rationing period?

A. Statements could be sent out to the customers when-
[106] ever a sheet was ready.

Q. But did you accumulate all of those checks?

A. From the time that I arrived at that branch we accumulated all the checks except the ones—

Q. And that was the practice in vogue at the time you arrived?

A. I will not vouch for what practice was in vogue before I got there.

Q. Well, you knew generally what the practice was respecting rationing, didn't you?

A. No, sir, I didn't.

Q. Well, you have testified—I am not endeavoring in any way to trap you on this. What I am trying to find out is if you really had the knowledge of the system of rationing in the bank, including these?

A. Yes, yes, I did, sir, but I don't know whether they were sending out statements regularly prior to my arrival or whether they just sent them out when they were called for. After my arrival we only gave them out when they were called for.

Q. Now, who put these pencil marks on sheet 2, do you know?

A. No, I don't. I think I drew that arrow.

Q. Do you remember when or on what occasion?

A. No. [107]

(Testimony of Richard C. Snodgress)

Q. It was after you discussed the matter with Mr. Taylor, was it not?

A. Yes, sir, I presume so. I am not sure how they got there.

Q. Now, let me see if I understand you. Mr. Taylor came in to see you—came into the bank. You recall that occasion and about the date?

A. No. I saw Mr. Taylor several times after my arrival there.

Q. Well, do you recall the first time that you sat down with Mr. Taylor and went over these ledger sheets?

A. No, I don't recall the exact date.

Q. Not the exact date?

A. I think it was in December of 1946 or January of 1947.

Q. And who was present at that time?

A. Well, I believe Mr. Eltinge was there.

Q. And at that time isn't it a fact that Mr. Taylor told you that you ought to recompute these figures?

A. I believe he did. I believe he said the checks did not belong in the account.

Q. And you made no recomputation at all until you had the conversation with Mr. Taylor, is that correct?

A. I think that is correct.

Q. So up to the time that Mr. Taylor arrived the bank [108] had treated in the course of ordinary business on page one here, the original copy, it as being down to the line which you drew?

A. Yes, sir; that is right. So far as we were concerned, that was the balance.

Q. And on page 2 I take it this is in the same condition except for the pencil marks. At the time Mr. Taylor

(Testimony of Richard C. Snodgrass)

called everything was on there except the pencil marks, is that right?

A. I don't know about that, sir. I don't know who made that copy.

Q. Now, on the third sheet it says, "As per E.X.P. on re-made sheet." What does that purport to represent?

A. Well, that is one check that was not—that should not have been reversed here. In other words, we reversed all the checks and on this previous sheet then deducted the one which apparently belonged there.

Q. In other words, you decided that that was, in your opinion, a proper correction, is that the idea?

A. (No answer.)

Q. Or not a correct correction. Let me put it that way.

A. Well, the correction was not complete, let us say. 240 needed to be deducted.

Mr. Carr: May I have just one minute, your Honor? I [109] am about to finish.

Q. By Mr. Carr: Did Mr. Taylor have someone else with him at that time, some other agent?

A. At one time Mr. Taylor came out, I am pretty sure, and he had someone else with him. I don't recall exactly.

Q. Approximately how many times would you say that you talked to Mr. Taylor? I know you can't be absolutely accurate but as near as you can remember how many times, from the first occasion, did you talk to Mr. Taylor?

A. Oh, probably about four times, four or five times.

Q. And each time it was in connection with his investigation of the defendant, Mr. Fly?

A. Investigating the ration record, yes.

Q. I note on page 1 that someone has crossed out "American-Italian Delicatessen, 4356 Sunset Boulevard,

(Testimony of Richard C. Snodgress)

Los Angeles, Cal.” Is that a pen mark or pencil? It has been crossed out. A. It looks like—

Q. Who did that? A. I have no idea.

Q. Well, is that an ordinary way of handling a record at the bank? A. Oh, no, sir.

Q. Is there any way you can find out why that was crossed out? [110]

A. No, there is no way I can find out. From the appearance of the line it looks like it was done on the top copy. This is the carbon here.

Q. This supposedly represents the name of the account, is that right—Italian-American Delicatessen, 4356 Sunset Boulevard. Now, someone has run a pen point X-wise, is that right? A. Yes, sir.

Q. And you have no explanation? A. No, sir.

Q. Could it mean in general practice that the account was being changed to some other name?

A. Well, it wouldn't be changed by X-ing out. That would not be standard procedure.

Q. That is not standard procedure to mark that out that way? A. No, sir.

Mr. Carr: That is all.

Redirect Examination

By Mr. Bell:

Q. Mr. Snodgress, Mr. Carr suggested to you some things that Mr. Taylor told you and told you to do. Is it the custom of your bank to do what investigators tell you to do so far as keeping your records is concerned?

A. No, sir. We kept the records as we determined they [111] should be.

Q. Any corrections that are made on there do you simply take Mr. Taylor's word for it or do you check

(Testimony of Richard C. Snodgress)

your own records to ascertain whether the corrections should be made?

A. No; we would check our own records.

Q. And then any correction that is made would be a correction in line with your other records?

Mr. Carr: Objected to as asking for a conclusion.

The Court: It is a rather leading statement. I will sustain the objection.

Q. By Mr. Bell: I don't understand the answer you have made here to the effect that on page one this figure representing the overdraft of 143,692 is an incorrect correction and should not appear there. What do you mean by that? It does appear there, doesn't it?

A. Yes, sir. I don't know that I expressed it quite the way you say it. If I did—

Q. Will you explain to the jury what you mean by saying that, when you were asked by Mr. Carr?

A. I presume I stated it was an incorrect balance, this overdrawn balance. If that is the case what I meant was that these checks were deducted from the balance of the account thereby creating this balance which was not properly chargeable to the account. Therefore, the balance that [112] resulted was incorrect.

Q. Did you see the checks yourself?

A. I believe I did, sir.

Q. And why do you now say they were not properly charged to the account?

A. Because they did not bear the name of the account on the check.

Q. What did they bear?

A. Most of them said, "Italian-American Import Company." Perhaps all of them did. I don't recall for sure.

(Testimony of Richard C. Snodgress)

Q. It wasn't until after you made that that you have now concluded it should not have been on there, is that right?

A. That is right.

Q. But as far as the mathematical figures are concerned, the number of checks which you saw made out to the Italian-American Import Company, if charged to this account, would bring this figure to 143,692 overdraft?

A. That is right.

Mr. Bell: That is all.

Recross-Examination

By Mr. Carr:

Q. I would like to ask a few more questions in view of that. You say now it was not properly charged but that was after, I believe, you talked to Mr. Taylor? [113]

A. Yes, sir.

Q. Now, you as a matter of practice in the bank, had treated the checks drawn by Mr. Fly as checks on that account even though they were written on the line above his signature "American Import Company."

A. Well, we may have placed them on the account but we wouldn't do that.

Q. The question is, did you do it?

A. We did place them on the account, yes.

Q. And isn't the reason you did that is because you knew and your officials in the bank knew, including the manager, that Mr. Fly was the sole proprietor of the business?

A. I didn't have any such knowledge myself.

Q. Well, do you have the knowledge that your manager knew that?

A. No.

Q. Do you now know that the manager knew that?

A. I don't quite understand your question, I guess.

(Testimony of Richard C. Snodgrass)

Mr. Bell: Objected to anyway as calling for a conclusion of the witness as to what somebody else knew.

Mr. Carr: I don't suppose he would know what another person knows. I will withdraw the question and ask it again. What I am getting at is, at the bank, when a ration check comes in, somebody determines whether or not it goes to a certain account, is that right? [114]

A. Yes, sir.

Q. And that person makes a decision and that check then is charged to that account? A. That is right.

Q. Now, in general practice the bank, whether it be a ration check or a check for money, doesn't charge a check to some account on which it is not written, is that right?

A. That is right, sir.

Q. Now, in this particular case the checks which were signed "James M. Fly," no matter what appeared above his name, were charged to that account, the American Delicatessen account?

A. They were charged to it, yes.

Mr. Carr: That is all.

Mr. Bell: No further questions.

The Court: We will have a short recess at this time. May it be stipulated the usual admonition has been given?

Mr. Carr: So stipulated, your Honor.

Mr. Bell: Yes, your Honor, so stipulated.

(Short recess.)

The Court: Let the record show the jurors are in the jury box and the defendant is in court with his counsel. Proceed.

Mr. Bell: Mr. Carle. [115]

(Testimony of Richard C. Snodgress)

Q. It wasn't until after you made that that you have now concluded it should not have been on there, is that right?

A. That is right.

Q. But as far as the mathematical figures are concerned, the number of checks which you saw made out to the Italian-American Import Company, if charged to this account, would bring this figure to 143,692 overdraft?

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A. Well, we may have placed them on the account but we wouldn't do that.

Q. The question is, did you do it?

A. We did place them on the account, yes.

Q. And isn't the reason you did that is because you knew and your officials in the bank knew, including the manager, that Mr. Fly was the sole proprietor of the business?

A. I didn't have any such knowledge myself.

Q. Well, do you have the knowledge that your manager knew that?

A. No.

Q. Do you now know that the manager knew that?

A. I don't quite understand your question, I guess.

(Testimony of Richard C. Snodgrass)

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A. Yes, sir.

Q. And that person makes a decision and that check then is charged to that account? A. That is right.

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A. They were charged to it, yes.

Mr. Carr: That is all.

Mr. Bell: No further questions.

The Court: We will have a short recess at this time. May it be stipulated the usual admonition has been given?

Mr. Carr: So stipulated, your Honor.

Mr. Bell: Yes, your Honor, so stipulated.

(Short recess.)

The Court: Let the record show the jurors are in the jury box and the defendant is in court with his counsel. Proceed.

Mr. Bell: Mr. Carle. [115]

JACKSON T. CARLE,

called as a witness by and on behalf of the plaintiff, having been previously duly sworn, was recalled and testified further as follows:

Mr. Carr: There was some witness to be recalled and I have forgotten who it is, your Honor.

Mr. Bell: Mr. Carle was to be recalled. Mr. Snodgrass and Mr. Eltinge were on this morning.

Mr. Carr: I was told by his Honor I was going to have an opportunity to ask a question of some witness and I am sure it wasn't of a man by the name of Carle.

Mr. Bell: If you wish to cross-examine further any witness who has heretofore testified I will stipulate that he may be recalled at this time, if you will just name the witness.

The Court: All right, let us proceed.

The Clerk: Your name is Jackson T. Carle?

The Witness: Yes.

Direct Examination (Resumed)

By Mr. Bell:

Q. You were sworn and testified yesterday, weren't you, Mr. Carle? A. Yes, sir.

Q. And you had testified that you were with the OPA and in charge of the registration records? [116]

A. Yes, sir.

Q. It now appears that those records are not available, Mr. Carr, so I shall ask you as to your recollection as to the contents of some of them. Calling your attention to the records of the registration of Mr. James M. Fly, and the American-Italian Delicatessen Company, among those records did you—strike that, please.

(Testimony of Jackson T. Carle)

What do you recall as constituting the records in your file?

A. We had two separate sets of records of our registrants who had bank accounts. One was the registration establishing the allowable inventory or stock of sugar which a wholesaler or retailer might have on hand. That was kept in our wholesale-retail section and then we had records showing the permission to establish a ration bank account along with a duplicate signature card, showing the signature that would be fixed to the ration checks.

Those were kept in our ration banking section.

Q. As to this duplicate signature card, from whom was that obtained?

A. That was obtained from the bank in which the account was kept.

Q. Now, you spoke of allowable bank account. How was that determined?

A. Upon the original registration of a retailer which [117] would be the class of sugar user in which a delicatessen would fall. The applicant filled out a form which was designated in our records as Form 305, in which he showed how much sugar he had sold in his store and how much he had purchased for sale in his store during the month preceding the start of rationing. From that figure we derived the amount that he might have on hand in general by dividing the monthly quantity by four, thus giving him a stock of sugar which he might have on hand equal to a week's supply.

Q. Do you recall the quantity of sugar which was allowed to be kept in the bank account by Mr. Fly or the Italian-American Delicatessen?

A. The registration form for the Italian-American Delicatessen showed on the basis of his declaration of

(Testimony of Jackson T. Carle)

sugar usage he was entitled to a 400-pound inventory of sugar. Subsequently, about a year and a half after his registration an additional quantity of sugar was allowed to consumers for canning purposes and it was necessary to increase the allowable inventory of sugar so the retailer could meet that additional demand from consumers and he was given an additional 20 per cent which would have amounted to 80 pounds as a loan.

Mr. Carr: I move to strike the entire answer as being immaterial to any issue involved in this case.

Mr. Bell: This shows what he was allowed to have. It [118] shows what he was authorized to have and upon this his bank account was based and it goes to show willfulness as to the fact that if a man knows he has only 400 pounds allowable and he is drawing 5,000-pound checks, it has a very definite bearing on his intent and knowledge.

Mr. Carr: The only trouble is it tends to mislead the jury. He is not charged here with an allowable amount. He is charged here with issuing checks on an account that did not exist. That is the sole charge.

Mr. Bell: And Mr. Carr sought to introduce yesterday how much his balance was so I think he himself has indicated the materiality of it.

The Court: I think a portion of it probably should go out. Will you read the question?

(Question read.)

The Court: Motion will be denied.

Q. By Mr. Bell: Now, what happened if a person had a larger balance in the bank than that allowed on his registration certificate?

Mr. Carr: That is objected to as being wholly immaterial. We are getting off, your Honor, into a trial of

(Testimony of Jackson T. Carle)

an issue that is not in this case. The simple issue here is whether or not the man had the account on which these checks were issued, and not what his allowables were.

Mr. Bell: Counsel himself injected the extraneous issue [119] of a different bank account. I have tried to keep it to the Italian-American Import Company, and counsel tried to bring in the delicatessen.

The Court: The objection is overruled.

Mr. Bell: Will you read the question?

(Question read.)

The Witness: That was classed as excess inventory and was recaptured by the Office of Price Administration. In other words, the holder of the excess inventory was required to sell the sugar or to surrender the ration points which he had in the bank, to the OPA, thus bringing him back to his allowable inventory.

Q. By Mr. Bell: I believe if my memory serves me correctly you were asked yesterday if you made a search to find if the Italian-American Import Company had a registration. Were you asked that question?

A. Yes.

Q. And James M. Fly personally. Were you asked that question? A. Yes.

Q. And you searched the records for both of those?

A. I searched the record and discovered only the Italian-American Delicatessen by James M. Fly.

Mr. Bell: You may cross-examine. [120]

(Testimony of Jackson T. Carle)

Cross-Examination

By Mr. Carr:

Q. You found the name James M. Fly on that registration, didn't you?

A. I found the registration for the Italian-American Delicatessen signed by James M. Fly as owner and on the signature card, Italian-American Delicatessen by James M. Fly.

Q. What was the address on it?

A. 4300 block on Sunset Boulevard.

Q. 4356?

A. That sounds approximately correct.

Mr. Carr: That is all.

Mr. Bell: No further questions.

The Court: Call your next witness.

Mr. Bell: Mr. Peterson, please.

FRED PETERSON,

called as a witness by and on behalf of the plaintiff, having been first during sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Fred Peterson.

Direct Examination

By Mr. Bell:

Q. Will you keep your voice up, Mr. Peterson, so all [121] the jurors can hear you? What is your occupation, Mr. Peterson? A. Public accounting.

Q. During the year 1946 what was your occupation?

A. Assistant cashier and chief clerk in the Bank of America.

(Testimony of Fred Peterson)

Q. What branch?

A. Santa Monica and Vermont branch.

Q. Do you know Mr. Eltinge there?

A. Yes, sir.

Q. Do you know Mr. Snodgress? A. Yes, sir.

Q. Do you know a man by the name of Gordon Smith? A. Yes, sir.

Q. Do you know the defendant, Mr. Fly?

A. Yes, sir.

Q. How long have you known Mr. Fly?

A. About seven years.

Q. Did you ever have any dealings with Mr. Fly at the bank there where you were employed?

A. Yes, sir.

Q. Did you ever have any dealings with him in connection with the sugar account? A. Yes, sir.

Q. Calling your attention to the early part of 1946, [122] did you see Mr. Fly? A. Yes, sir.

Q. Did you have any conversations with him in connection with his sugar account at the bank?

A. Yes, sir.

Q. Can you recall where and when the first conversation occurred, approximately?

A. No, I couldn't say exactly where.

Q. Did you have one or more than one conversation with him? A. More than one.

Q. Well, would you say there were a few or a great many? A. A great many.

Q. How frequently did you see Mr. Fly during the period from the first of 1946 up to the end or about October, 1946? A. Practically every day.

Q. And did you have conversations with him on those occasions? A. Yes, sir.

(Testimony of Fred Peterson)

Q. Calling your attention now to the earliest conversation you can recall with Mr. Fly—I believe you stated you cannot recall where the first one occurred?

A. That is right. [123]

Q. Where are the places at which you had conversations with him?

A. Usually—well, at his store or when he would come in the bank.

Q. And by store do you mean his delicatessen store?

A. Yes, sir.

Q. You also talked to him in the bank?

A. Yes, sir.

Q. Do you recall seeing him at any other place?

A. Oh, yes, I was with him several other places.

Q. Well, what other places do you now recall?

A. Well, we would go out to dinner in the evening—things like that.

Q. Does Mr. Fly have more than one place of business? A. Yes, sir.

Q. Did you see him at any of the other places of business? A. Yes, sir.

Q. All right. Now, coming back to the earliest conversation that you can recall in the first part of 1946, can you recall who was present at the conversation?

A. I don't believe anyone would be present.

Q. And you cannot now recall whether the first conversation occurred—can you recall where it did occur?

A. No, sir. [124]

Q. Will you relate that conversation?

Mr. Carr: I would like to have a date fixed.

Q. By Mr. Bell: Can you fix the date any closer?

A. January or February, probably—the early part of 1946.

(Testimony of Fred Peterson)

The Court: All right.

Q. By Mr. Bell: What was the conversation you had with him?

Mr. Carr: Object to that on the ground the conversation took place prior to the offense charged, your Honor.

Mr. Bell: This, your Honor, shows a continuing course of conduct. The conversation we intend to show was where the arrangements were made and they were continuously acted upon throughout the rest of the year.

The Court: I will reserve a motion to strike if it is not connected up.

Q. By Mr. Bell: What was the conversation, Mr. Peterson?

A. In regard to the sugar account which was overdrawn at the time?

Q. Yes, what did he say and what did you say?

A. He asked me if I could credit the account. I told him I could and I did.

Q. What did you do?

A. Well, I credited the account with a phoney deposit. [125]

Q. Do you recall how much it was?

Mr. Carr: I move to strike the word "phoney." "Phoney" is a lingo that I don't understand.

The Court: You had better explain what you mean.

The Witness: Well, it was an invalid deposit.

Q. By Mr. Bell: Do you recall how much the deposit was?

A. No.

Q. When you say it was invalid what do you mean by that?

A. Well, I just—

Mr. Carr: I object to this on the ground it is asking for the witness' conclusion.

(Testimony of Fred Peterson)

Mr. Bell: I am asking him to interpret the meaning of his word. You objected to the word he used.

Mr. Carr: I will ask the word "invalid" be stricken, too.

The Court: He is trying to explain what he means by it. Go ahead.

The Witness: I just made it up. There was actually no credit there.

Q. By Mr. Bell: Did you make up the amount of the credit? A. Yes, sir.

Q. How about the date? Did you make that up? [126] A. Yes, sir.

Q. And anything else on the entry that you made?

A. Well, probably a transit description.

Q. And when you made that what did you put that entry upon—what kind of paper—what was the form?

A. A regular sugar deposit slip.

Q. Merely as an illustration of the form and not pertaining to the figures thereon at all, did it resemble the form of deposit slip here which is Government's Exhibit 7-8? A. Yes.

Q. Did it read as this one does, the ration deposit slip: "The United States of America, Office of Price Administration, Sugar Credits Deposited in" and then the name of the bank? A. Yes, sir.

Q. Did you have any other conversations around that time with Mr. Fly?

Mr. Carr: I am going to object to this line of questioning, your Honor, on the ground it is highly prejudicial. It does not relate to any issue involved in the case. It doesn't go to show intent with respect to the charge in the indictment, to-wit, that there was no bank account on which these checks were issued.

(Testimony of Fred Peterson)

The Court: Objection overruled.

Q. By Mr. Bell: Did you have further conversations [127] with Mr. Fly around that time?

A. Yes, sir.

Q. Can you fix the approximate time of the conversations—that is, by date?

A. I couldn't fix the time by date because I saw him every day.

Q. Can you fix the place that the next conversation you recall occurred? A. No, sir.

Q. Well, on the next conversation that you can recall was anyone else present? A. No, sir.

Q. What was the conversation you had thereafter?

A. It was in regard to the same thing.

Q. What was said? What did you say and what did he say?

A. Well, it was just that he asked me if I would credit his account with these invalid deposits.

Q. What did you say?

A. I agreed to and I did.

Q. And you did so? A. Yes, sir.

Q. Now, on about how many occasions can you recall having done that—gone through that process of entering deposits to his credit? [128]

A. There were several.

Q. Was there any break or secession in that conduct or did it continue rather generally and regularly throughout the rest of the year? A. Yes, it did.

Q. Well, what did—what is your answer?

The Witness: It continued throughout the year.

Q. Did you have any conversation with Mr. Fly concerning ration checks? A. Yes, sir.

(Testimony of Fred Peterson)

Q. When was the first conversation you recall having with Mr. Fly concerning ration checks?

A. I couldn't say as to that either.

Q. Did you have more than one? A. Oh, yes.

Q. Did you have a great many? A. Several.

Q. Well, can you fix the time or the place of the earliest of those conversations? A. No.

Q. Well, were any of them held at his place of business? A. The checks?

Q. The discussion as to the checks. Were any of those held in his place of business? [129]

A. The discussions were, yes, sir.

Q. Were any of them held at the bank?

A. Yes, sir.

Q. What was the earliest discussion that you now recall concerning checks?

A. Well, I couldn't say just when, only I decided that it was easier to destroy the checks than it was to make the invalid deposit.

Q. Did you have any conversation with him along that line? A. Yes. We talked about it.

Q. Now, as nearly as you can recall what did you say and what did he say?

Mr. Carr: I am going to object again, your Honor, the same objection. This is purporting to show, I assume, similar offenses and I object on the ground that they are not similar offenses. That testimony is prejudicial to this defendant and does not involve the charges in the indictment.

Mr. Bell: One of the charges in the indictment is that he willfully and unlawfully and knowingly wrote these checks and that there was no mistake about it.

(Testimony of Fred Peterson)

The Court: Objection is overruled.

Q. By Mr. Bell: As near as you recall now try to think back and recall just what Mr. Fly said to you and what you said to Mr. Fly. [130]

A. In regard to these checks?

Q. Yes. You said that you had told him you were going to destroy the checks? A. Yes.

Q. Rather than make deposits? A. Yes.

Q. Fictitious deposits. Now, what did you say and what did he say?

A. Well, as near as I can remember—

Q. Keep your voice up.

A. As near as I can remember I just told him that I would destroy the checks. He asked me if I would and I told him yes and that was about the size of the conversation.

Q. All right. Did you have more than one conversation on that subject? A. Oh, yes, several.

Q. Well, was anything further said at these other conversations?

A. Oh, it was all about the same thing. It was always about the checks.

Q. I am asking you, Mr. Peterson, to try to remember as nearly as possible, in all fairness to Mr. Fly so that you will quote him as nearly as you can, I am asking you to search your memory now and try to say just what he said and just what you said if you can possibly recall it? [131]

A. Well, that I can't do. He asked me to take care of them and I said that I would.

Q. And did these conversations cease sometime in 1946 or did they continue up until the latter part of 1946?

(Testimony of Fred Peterson)

A. They continued right up until the latter part of 1946.

Q. You are no longer with the bank, are you?

A. No, sir.

Q. When did you leave the bank?

A. September 30th, 1946.

Q. Did you have any conversation with Mr. Fly concerning your leaving the bank? A. Yes, sir.

Q. Where did that conversation occur?

A. I couldn't say the exact place.

Q. Well, was it at his place of business, at the bank, or where? A. Probably at his place of business.

Q. Was anyone else present? A. No, sir.

Q. Now again think back and try to recall as nearly as you can what you said to him and what he said to you.

Mr. Carr: Objected to on the ground it is wholly immaterial.

The Court: I can't tell you from the way the question is asked whether it is material or not. [132]

Mr. Carr: But, your Honor, the answer comes out and then it is like the old saying—you don't like for me to say it, I know, but if you will pardon me, it is like, you know, ringing the bell once. The harm is done.

The Court: Well, I will reserve a motion to strike. You may answer the question.

The Witness: Where were we now?

The Court: He is asking for the conversation at the time you were leaving the bank or when you were about to leave the bank.

The Witness: I told Mr. Fly that I had prepared my resignation and intended to put it in and that he shouldn't

(Testimony of Fred Peterson)

write any more checks. And at a later date, he contacted me and told me that he had written more checks and asked me to go back to the bank.

Q. By Mr. Bell: When was this?

A. That was about the middle of October.

Q. Where did you hold the conversation?

A. That particular conversation, I remember, was at Tom Brenneman's Restaurant over dinner.

Q. Was anyone else present? A. No.

Q. Now, relate, if you can, the entire conversation.

A. Well, I told him that I wouldn't go back to work at the bank and he said, "Well, we will have to do something," [133] and it was then that it was suggested—

Q. Who suggested it?

A. Mr. Fly suggested that I see Mr. Smith.

Q. Who was Mr. Smith?

A. He was employed at the bank at that time.

Q. Was that the Mr. Smith who succeeded you?

A. Yes, sir.

Q. All right, go ahead and tell the rest of the conversation. A. I approached Mr. Smith.

Q. Well, going back to the conversation, have you related all of it that you can recall?

A. Well, as I recall it, that was about all there was. I told him I would see Mr. Smith, which I did.

Q. Well, is your memory exhausted as to anything further that was said at that time?

A. Well, he said he would pay Mr. Smith one cent a pound for these checks.

Q. Well, did he say anything further about what you should do? A. No, sir.

(Testimony of Fred Peterson)

Q. Well, do you recall whether or not he asked you to tell Mr. Smith anything?

A. Only that he told me to ask Smith if he would take care of it. [134]

The Court: You cannot tell us what you told Smith. After you talked to Smith did you report back to Mr. Fly?

The Witness: Oh, yes, then I did.

The Court: To Mr. Fly?

The Witness: Yes, sir.

Q. By Mr. Bell: Did you contact Mr. Smith?

A. Yes, sir.

Q. And did you report back to Mr. Fly?

A. Yes, sir.

Q. And where did you see Mr. Fly?

A. I don't recall the exact location.

Q. Well, about when did you see him?

A. Well, it would have been the next day, the day after I talked to Mr. Smith.

Q. Did you have a conversation with him?

A. Yes, sir.

Q. Relate the conversation as nearly as you can.

A. I told him—

Mr. Carr: I assume, if I may interrupt, my objection will run to this line of testimony.

The Court: That is all right.

Mr. Carr: On the same ground, your Honor.

The Court: That is right.

Q. By Mr. Bell: Relate what he said to you and what you said to him as nearly as you can remember. [135]

A. I told him I talked to Mr. Smith and Mr. Smith had agreed to destroy these checks as they came in.

(Testimony of Fred Peterson)

Q. Do you recall whether anything further was said about the one cent a pound?

A. No, only that he had said he would pay him one cent a pound. That was understood.

Q. Did you thereafter have any further dealings with Mr. Fly in connection with the sugar ration account at the bank?

A. Yes, sir.

Q. What was the transactions that you had after that?

A. Mr. Fly gave me money to give to Mr. Smith.

Q. When he gave you the money did he say anything to you?

A. Just, "Give this to Mr. Smith." "Smitty" we called him.

Q. About how many occasions did he give you some money to give to Mr. Smith?

A. Several. I would not know.

Q. By "several" can you recall whether it was five or six or seven times?

A. Well, 10 or 15 times, 10 or 12.

Q. On each occasion can you recall how much he gave you to give to Mr. Smith?

A. Always various amounts, \$75.00 or \$100.00 or \$125.00. [136] Small amounts like that.

Q. Mr. Peterson, will you describe to the jury a little more completely the manner in which you handled these accounts and as you described briefly, extract or destroy the checks. Will you describe what happened—how those checks were handled?

A. Well, the checks came into the bank on a transmittal letter, possibly two or three times a month.

Q. When did they arrive at the bank—what time of day?

A. In the early morning by messenger.

(Testimony of Fred Peterson)

Q. In what form were they when they arrived?

A. They were fastened around the transmittal letter with a rubber band.

Q. What time did you get to the bank?

A. Usually around seven o'clock.

Q. Do you know what happened then to these ration bank accounts or checks?

A. Yes, sir.

Q. Describe what happened physically?

A. Well, they were placed in the vault and kept there until the end of the month.

Q. Did you place them there?

A. Yes, sir.

Q. Did anyone else handle these accounts other than [137] you?

A. No, sir.

Q. At the end of the month what happened?

A. At the end of the month they were brought out along with all of the other accumulation of ration evidences that would come over the counter. They would be worked up and charged to the various accounts.

Q. And when you came to check those ration checks did you see any checks made out by the Italian-American Import Company?

A. Yes, sir.

Q. And signed by James M. Fly?

A. Yes, sir.

Q. When you came to those checks what did you do with them?

A. I pulled those out and destroyed them.

Q. Have you been prosecuted for your part in that transaction?

A. Yes, sir.

Q. Have you been sentenced?

A. Yes, sir.

Mr. Bell: That is all.

(Testimony of Fred Peterson)

Cross-Examination

By Mr. Carr :

Q. When was the last time you saw Mr. Fly, Mr. [138] Peterson? A. Day before yesterday.

Q. Where did you go to see Mr. Fly on that occasion? A. I just stopped to talk to him.

Q. How much did you ask him for?

A. I asked him for \$100.00.

Q. Mr. Fly doesn't owe you any money at this time, does he? A. He has promised to pay my fine.

Q. Promised to pay your fine? A. Yes, sir.

Q. When was that?

A. Well, right after my—right after I was sentenced.

Q. Why don't you have money to pay your own fine?

A. No, sir.

Q. Why don't you have? A. (No answer.)

Q. When you left town you had \$6,000 in the bank, didn't you? A. Yes, sir.

Q. Where is the \$6,000?

A. Most of it I repaid to my brother-in-law.

Q. To your brother-in-law? A. Yes, sir. [139]

Q. When did you leave town?

A. About the latter part of November or first of December.

Q. Was that at the time the news came up that something might happen?

A. Yes, sir. Mr. Fly told me that he was being investigated.

Q. And you got out of town? A. Yes, sir.

(Testimony of Fred Peterson)

Q. Where were you picked up by the marshal?

A. At Las Vegas.

Q. And you were brought to Los Angeles?

A. Yes, sir.

Q. And were you put in jail?

A. Not here in Los Angeles.

Q. How did you get out? On bail?

A. Yes, sir.

Q. Who made your bail? A. Mr. Fly.

Q. He paid for your bail, did he? A. Yes, sir.

Q. Did you ask him to pay for your bail?

A. Yes, sir.

Q. You and Mr. Fly had been friends for some time?

A. Yes, sir. [140]

Q. And how many times have you talked with Mr. Taylor here after you got back to Los Angeles?

A. I didn't talk to Mr. Taylor after I got back to Los Angeles.

Q. What agents did you talk to?

A. I didn't talk to any agent.

Q. You talked to Mr. Bell?

A. I talked to Mr. Bell just before I came up here the other day.

Q. Well, you entered a plea, didn't you, in some other court? A. Yes, Judge Mathes.

Q. And I believe you got a fine? A. Yes, sir.

Q. You, of course, were not promised anything by anyone, were you? A. No, sir.

Q. Was there any implication you would not be called as a witness?

(Testimony of Fred Peterson)

A. No, sir; my attorney told me he didn't think that I would be called as a witness but that was the only assurance.

Q. You were not in jail; you are out and free, aren't you?
A. Yes, sir.

Q. And all you have now is a fine to pay? [141]

A. Yes, sir.

Q. Incidentally, how many people were you tearing checks up for?
A. Mr. Fly is the only one.

Q. Was that the only one?

A. Yes, sir; I covered an overdraft for one other party.

Q. And, of course, you got nothing out of these things yourself?
A. Well, I wouldn't say that.

Q. What?
A. No, I got something out of it.

Q. When did you decide to leave town, by the way?

A. Shortly—just right before I left.

Q. It was a rather sudden decision, I take it, isn't that right?
A. Yes, sir.

Q. And where were you at the time—I believe you said they found you in Arizona?

A. Yes, in Nevada.

Q. Now, isn't it a fact that you called Mr. Fly several times and asked him for money recently?

A. Yes, sir.

Mr. Carr: That is all. [142]

Redirect Examination

By Mr. Bell:

Q. When you left town did Mr. Fly say anything about your leaving town?
A. Yes, sir.

Q. What did he say?

A. Well, he advised me to leave town.

(Testimony of Fred Peterson)

Mr. Carr: I move to strike that answer. I object to the word "advise".

The Court: I will strike out the word "advised".

Q. By Mr. Bell: Where and when did the conversation occur? A. It was on the telephone.

Q. You have talked to him on the phone before?

A. Yes, sir.

Q. And you are able to recognize his voice?

A. Yes, sir.

Q. What was the conversation?

A. Well, he told me that he was being investigated and he thought it would be a good idea if I would leave town. I was planning to leave anyway to go back to Nebraska.

Q. But that was his statement as nearly as you can recall it? A. Yes, sir.

Mr. Bell: That is all. [143]

Recross-Examination

By Mr. Carr:

Q. How long had you worked in the bank, by the way?

A. Seven years in the Bank of America.

Q. What was your occupation previous to that time?

A. Ten years with the Federal Reserve Bank.

Q. And how old are you, sir? A. 33.

Mr. Carr: That is all.

The Court: Step down. Have you any more witnesses, Mr. Bell?

Mr. Bell: No, your Honor, the Government will rest at this time.

The Court: Ladies and gentlemen of the jury, the court admonishes you not to converse among yourselves or with

anyone else on any subject connected with the trial, or form or express an opinion on it until the cause is finally submitted to you.

Mr. Carr: May I address the court before you let the jury go? I would like to address the court for a short while this afternoon.

The Court: That is what I am going to do now. The jury will retire and then you may address the court.

Mr. Carr: But it is going to take some little time.

The Court: That doesn't matter, we will take the time. [144]

(Whereupon, the jury retired from the courtroom.)

(The following proceedings were had without the presence and hearing of the jury:)

Mr. Carr: Your Honor, I would like a little more time than you have allowed. I would suggest that you recess until about 2:30 or a quarter of three. There is some argument I would like to make.

The Court: Let us have the argument now and then come back at two o'clock.

Mr. Carr: The only thing is, I promised to be in my office at 12:30. I am caught in one of those predicaments where human affairs are involved. Some dear friends of mine have all turned-coat on me and I have a fight out in Beverly Hills on the Home Owners Protective Association and it is pretty hot and rugged.

The Court: Very well, we will let you argue until 10 minutes before 12:30 and then you can finish later.

Mr. Carr: The case is practically over because, very frankly, if your Honor denies my motion my case will last only about 10 minutes.

The Court: Let us see what your motions are. Frankly I have read the case and I do not get the point.

Mr. Carr: That is just one of the indirect points, your Honor.

At this time I wish to move on behalf of the [145] defendant Fly, for a judgment of acquittal on each and every count of the indictment under Rule 29.

Now, my main contention is going to be toward the felony counts, the first seven counts, and the second portion will be that there has been a variance, but the most important consideration as I see it is the matter of whether or not an offense has been charged under the first seven counts.

The indictment charges practically in the terms of the statute. I will take the first count as an example:

“On or about November 11, 1946, in the County of Los Angeles, California, James M. Mosca, otherwise known as James M. Fly, knowingly and willfully made and use and caused to be made and used a false bill, account, claim and certificate, to-wit: A sugar ration check.”

Now, it is my contention and I argued that matter rather briefly before Judge Mathes, and with all due respect for his judgment I think he gave it rather hurried consideration. I believe it was an error to overrule the motion to dismiss.

Now, in the first place, it has got to be a “false bill, account, claim or certificate.”—one of those four.

Now, in the first place, your Honor, it can't be an account, it certainly can't be a claim and certainly it [146] isn't a certificate. The question is whether or not, according to the Government's insistence, it is a false bill.

Now, without going into great detail I have checked all the dictionaries and I find the word "bill" to mean bill of complaint, bill of injunction, bill of exchange—many things.

The Government seems to contend by its memorandum that "bill" means bill of exchange. Now, I went to the trouble to go back to the Act at its inception and traced the legislative history from the very beginning and I have it here, a portion of which I will call to your Honor's attention, which to my mind clearly shows the word "false bill" was never intended to mean a bill of exchange.

Had it been intended to mean a bill of exchange we must remember one very definite thing and I would like to preface my entrance into that subject with just a short mention of what a bill of exchange is.

Now, mind you, it does not say "a bill of exchange". Let us take the Government's position for a moment and say that "bill" does mean a bill of exchange.

Could ration checks be bills of exchange? In the first place, it is so fundamental it hardly needs mentioning that a bill of exchange is for a sum of money—not a sum of ration points.

Now, I don't think, your Honor, there could be any [147] question about that.

I have gone back to the negotiable instrument law and I find nothing in there to indicate that a bill of exchange can be other than for a sum of money. It is by Code in California that a bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at fixed or determinable future a certain sum of money.

Now, if you go back to all of the old cases, and I have some here but shall not take your Honor's time by reading them—I know your Honor is schooled in these things and it would be a waste of time, but all the old cases clearly hold that a bill of exchange is neither an export or import nor an exchange of commodities. It is a document for a fixed sum of money.

Now, it is my contention in this case that this check which was issued on a ration account at a bank is certainly not a false bill. It can't possibly be.

Now, in connection with the legislative history of the statute—it is very lengthy and I am going to try to eliminate a great deal of it.

The Court: I will grant that when rationing was in effect they probably did not contemplate it, but that isn't the point. The point is whether the language is broad [148] enough to cover situations which they did not contemplate.

Mr. Carr: I will make that concession.

The Court: Otherwise, every time a new suit arises you would have to—

Mr. Carr: I quite agree with your Honor.

The Court: Amend the bill. This question has risen repeatedly and the courts have had no difficulty in tying them in.

Mr. Carr: I understand that.

The Court: In tying them in to rationing. I long ago held that ration coupons were a writing of the type involved and our Circuit Court of Appeals had no difficulty in so holding. You are familiar with the case. That had to do with a prescription being filled by a druggist and it was held that the prescription was an instrumentality through which something was obtained.

Mr. Carr: I do not quarrel with that. I think that is absolutely sound, but here you have an entirely different situation. You have a statute which was a claim statute but which now has been enlarged to cover not only claims against the Government but false statements in connection with claims or false statements to an agency.

Now, when you are using the term "false bill" you are legislating and likewise if you include a ration check because a check is not a bill—it is not a bill of [149] exchange and it never has been and it never will be until the law is completely changed.

The Court: Let me call your attention to a case which Mr. Bell did not recite in his memorandum, but which I have had occasion to study. It is a case from the Second Circuit—United States against Goldsmith.

In that case the man was charged with falsifying in an affidavit which he filed with the consular officer for the purpose of securing the issuance of a quota immigration to an alien.

Mr. Carr: I am familiar with that case, your Honor.

The Court: In that case the court held that an affidavit of that type was a means of obtaining a privilege from the United States. They did not try to designate whether it was a false bill or account or claim or certificate.

Mr. Carr: That comes under the second portion of the statute. It comes under the portion which says that if a false statement made to an agency was within the jurisdiction of the United States—there are two sections to this Act.

Mr. Bell: That is the portion this action is brought under.

Mr. Carr: I don't agree with you, counsel. You have got two breakdowns of that section. You have such a thing as a false claim.

The Court: "or whoever shall knowingly and willfully [150] falsify or conceal or cover up by any trick, scheme, or device a material fact—"

Mr. Carr: "or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States or America is a stockholder—"

and so forth.

Mr. Carr: Your Honor, may I interrupt for a moment at this point? There you have a false claim or you have a false statement made to an agency of the Government, or you have an offense by using a false bill, a voucher, or receipt and so forth. You have separate offenses. This charge is laid under the latter one which has to do with the presentation of a false bill, account, claim or certificate containing something fictitious, and my contention is, your Honor, that it is not a false bill. It cannot be a false bill.

The statute by no stretch of the imagination was ever intended nor does it on its face cover a ration check. [151] If I sent a bill in and it had erroneous statements or entries that would be an offense.

The Court: Why couldn't you have a bill which instead of calling for money calls for things in kind?

Mr. Carr: The question is, what does the statute mean—what does “false bill” mean?

The Court: I agree with you that at the time this statute was enacted nobody thought of rationing. The question is if the statute is broad enough to cover it.

Mr. Carr: Wouldn't even cover a check in my opinion; it wouldn't cover a bill of exchange to my mind. I don't think the words “false bill” would cover a plain check for money because the legislative history shows it was always contemplated to mean a bill or a voucher or something which you are presenting with a false entry in it. In other words, a bill of account or a certificate or registration or something to influence the agency to act. But here you have nothing but a straight check, a check which could be a money check or a ration check. It is not a false bill.

The Court: It is a claim against an account.

Mr. Carr: I can't conceive, your Honor, of a situation where I would draw a check on the Government. The statute never contemplated a draft on the Government.

The Court: The main point is this— the presentation of any kind of paper the object of which is to get something [152] which you would not otherwise get and that paper would be a claim.

Mr. Carr: But a check for ration points is not a claim.

The Court: Certainly it is a claim. You are drawing against a pool which you have there.

Mr. Carr: Your Honor, that seems to me, with all due respect to your Honor's judgment, to be stretching the statute a long ways. Here is a statute on the books

which was never contemplated by its legislative history, or by any of its amendments, to contemplate the mere drawing of a bill of exchange. You are construing here that a check is a claim and I can find no cases in the books where a check has ever been called a claim.

The Court: Look at the case of Johnson against Warden, 134 Fed. (2d) page 166. That is a case from the Ninth Circuit:

“Whoever shall utter or publish as true, any false, forged, altered or counterfeited bond—”

and this is the prescription case.

Mr. Carr: That is a writing.

The Court: It says:

“any false, forged, altered, or counterfeited bond, bid, proposal, contract, guarantee, security, official bond, public record, affidavit, or other writing—” [153]

Now, you say that they did not intend to cover private writings at all?

Mr. Carr: I think the statute shows on its face it covers private writings. That is the difference between that and my situation here.

The Court: But in this decision they had no difficulty in holding this was a writing although a private writing.

Mr. Carr: I am in accord with your judgment on that, but in this case I say the words “false bill”, “account, claim and certificate” do not cover an ordinary money check and it certainly could not cover a ration check because it is not a bill and it is not a claim. A claim—

The Court: A claim is a demand and a check against an account is a demand upon that account. You are not asserting a claim against the person; you are making a demand upon the account and therefore any demand would be a claim. It doesn't have to be just a claim of money.

You see, this statute is one of our oldest statutes.

Mr. Carr: I know it is. I traced it from its very inception.

The Court: It goes way back. It arose during the graft following the Civil War.

Mr. Carr: 1863, I think, —

The Court: Yes, 1863 during the Civil War and the Reconstruction Period. [154]

Mr. Carr: And I have come down to date. You remember the officials from the Department of Interior and Mr. Harold Ickes wrote a letter in which he said he could not enforce the old petroleum industry code and NRA because they were having trouble in getting these people who were making false statements in different kinds of documents and that is what brought about the amendment. But a bill of exchange or check has never been contemplated at any time and I think your Honor is stretching the statute almost beyond its elasticity when you construe a claim, a check on a ration account to be a claim.

The Court: In the case of Fulmer against the United States, there was involved the gold reserve. They had no difficulty in determining where in order to obtain a gold reserve you had to make a certain claim or affidavit and the regulations prescribed an affidavit, but they had no difficulty in reading that into it.

Mr. Carr: That I concede.

The Court: And here is a stronger case. It is not from our circuit but they held that a man who falsified his own records as to narcotic prescriptions—

Mr. Carr: That was the Cotton case involving loans to cotton people. He kept false records. It was an OPA case. I agree with that, that it was held if you keep false records it was within the meaning of the statute. But here [155] you are dealing with just a plain ration check which is not a claim, not a false bill. It is not a certificate in my opinion.

The Court: All right, here is another case from the second Circuit where a man had counterfeited gasoline coupons and the court had no difficulty in holding that gasoline coupons came within that section.

Mr. Carr: And I can go along with that, your Honor, but I cannot bring myself to believe, your Honor, that this statute contemplated a ration check when it said false bill, account, claim or certificate.

The Government has never contended for that. Your Honor is more or less saving them at this late moment.

The Court: I am not saving them. You know what I used to tell my students in law school? I used to tell them the judge is supposed to know more than the lawyers. After all, if I commit error Mr. Bell is not reversed—I am reversed. It is no argument that he is not urging the point. I am supposed to see the point whether he urges it or not.

Mr. Carr: But to persuade your Honor I am pointing out that with all the ingenuity of the United States Attorney's thinking he never came up with the proposition that a claim was a ration check. He always stood on the proposition it was a false bill.

The Court: But it is so alleged. Suppose you present [156] a false demand to a grain elevator for 1,000 bushels of wheat to which you were not entitled? That would be a demand against the elevator people. Let us talk about whiskey. Whiskey is kept in bonded warehouses. You are supposed to withdraw whiskey only by presenting a warehouse receipt. Suppose you present a fictitious or fraudulent warehouse receipt—

Mr. Carr: Then that is a false certificate.

The Court: It isn't a false certificate; it is a false demand.

Mr. Carr: It is a certificate because those are certificates.

The Court: They are individual certificates and not public writings.

Mr. Carr: That is not involved.

The Court: I would not limit that any more than I would limit 72.

Mr. Carr: A certificate under this section—

The Court: Let us get down to claims. Let us have one of the checks that he drew against the account. I will make it up to you. I will let you go until 2:30.

“Transfer to the sugar ration bank account of Stuart & Final 10,000 pounds of sugar. Italian-American Import Company. James M. Fly.”

What is this? [157]

Mr. Carr: A ration check.

The Court: It is a demand addressed to the bank to transfer from this man's account 10,000 pounds of sugar. That is a paper which will entitle this man to go out and purchase 10,000 pounds of sugar. It is just

as much a claim as if it were a claim for money. In other words,

“Transfer to Charlie Carr \$5,000.00”

and addressed to the Bank of America. Of course, if you signed it it would be good; if I signed it it wouldn't be any good.

Mr. Carr: What you are doing, your Honor, is taking a plain ordinary check, which is nothing more than a document drawn on an account, and you are turning it into a demand—not a demand, but a claim against the Government or an agency of the Government. That is what it has to be. It has to contain a false entry. Now, for example, where is the false entry in that?

The Court: The false entry in this, if the jury believes there was no such account, then the false entry is a false demand upon a non-existence account which was handled as this young man testified.

Mr. Carr: Will your Honor bear with me for just a moment? Here we have Ration Order No. 3. I just tried one of these cases not long ago. It covers ration banking, overdrafts, underdrafts, alterations—everything under the sun. [158]

Now, we are stretching a felony statute to where a plain ordinary ration check has now come under a statute passed after the Civil War or during the Civil War. We are stretching it now to mean—that a ration check means either a claim or a false bill. It seems to me, it may not be persuasive, but it has some persuasion that the trouble that was gone to to provide all of these sections in Ration Order No. 3 with respect to ration banking—I would like just to refer to one little phase here.

They covered everything but inheritance taxes in this ration Order No. 3.

The Court: This would not be the first time they have done it. I think you were the United States Attorney when the case of United States against Anderson was tried. The man was accused of stealing aluminum alloy and the statute said, "Property which was being made or manufactured for the Government of the United States," and I wrote the first opinion interpreting that section and I held that the man who stole that aluminum alloy was stealing something which was being kept there to be turned into parts of airplanes for the Government of the United States, and the statute therefore covered it.

Mr. Carr: I understand, but what I am getting at here, we are taking a felony statute which if it does cover the situation certainly takes a lot of legal reasoning and here we have got a whole page of sections which cover everything [159] from lost checks to how deposits are made, how errors must be corrected; the issuance of checks, altered, mutilated checks; overdrafts and everything else. Under that they come into court with 12 counts, stretching seven of them into felony counts, and how we can deal in the idle sophistry of calling them claims is more than I can understand.

The Court: But my friends on the Circuit bench may.

Mr. Carr: They might not be as resourceful as you are.

The Court: They might see it and I have to anticipate what they might see.

Mr. Carr: Of course, if your Honor feels strongly about it and has reached that conclusion there is nothing I can do, but with all due respect I wish during the

lunch hour your Honor would give a little thought to that.

The Court: That is what I have been doing since day before yesterday.

Mr. Carr: I am asking for a little more grace. You might think a little more about it during the lunch hour because I am sincere in saying this—I feel very strongly that these felony statutes do not cover the situation. I will leave it at that but I would like one other point to be made, and that is respecting variance.

They have charged here that there was no sugar ration account in the name of James M. Fly or the Italian- [160] American Import Company. The evidence shows there was an account in the name of James M. Fly. He was the sole proprietor and that account was used by him, and I would like to base that as an additional ground and that on all of the counts in the indictment that a judgment of acquittal should be ordered by your Honor. It seems to be cutting the line pretty fine when he is the sole proprietor and has an account at the bank, and the testimony shows they recognized him as the sole proprietor. They charged his checks against that account whether it was the Italian-American Import Company or the Italian-American Delicatessen. They knew he was the sole proprietor and so treated him and all the evidence shows that.

The Court: That is a matter to argue to the jury.

Mr. Carr: Once more I want to seriously contend that the seven felony counts have been stretched beyond all elasticity to try to cover a ration check under some word such as "false bill, account, claim or certificate", and I respectfully submit there ought to be a judgment of acquittal on the felony counts.

The Court: All right, Mr. Bell.

Mr. Bell: I don't believe there is any necessity of my going any further here because your Honor pointed out nearly everything that needs to be said on the matter.

I think the principal thing to bear in mind is that [161] the statute was intended to be broadly construed. There are cases so holding. Naturally every time a new application of the statute is involved there will be strenuous objection to the effect that the statute was never intended to cover that particular kind of bill or document or statement, and each time undoubtedly it was seriously urged that while the statute of course covered these other things which the various Circuit Courts have held to be within the statute, in this case we are going beyond and we are stretching the statute and therefore we shouldn't stretch it this far.

I know your Honor has looked at the case which I have indicated and further you have looked at some I haven't even included. Insofar as the Goldsmith case is concerned, which your Honor started to quote, Mr. Carr says, "but that case was based upon the latter part of the statute", but so is this one. Both the Goldsmith case and this case are based upon the same statute.

Without further detail I submit that the statute is broad and even though the words "sugar ration checks" are not used, it is just as your Honor pointed out in a recent speech on the Constitution. The exact language has not changed but the situation that it is required to fit has changed and so it is with the statute. We cannot possibly describe in exact terms every bill, every kind of paper, every document which will be covered by the statute. As pointed out by one of the cases [162] at the time when the statute was enacted, there were de-

cisions on the books in which the word "bill" was simply used to indicate bill of exchange. They did not go through and say "bill of exchange" each time. There is that old Supreme Court case which is cited in the trial memorandum and by reading that throughout I imagine literally dozens of times in that rather lengthy decision, all the court says is "bill, bill, bill", except one place where it says "Bill of exchange".

Consequently, it is clear that even if we interpret it as a bill or bill of exchange it would be covered by the statute.

Furthermore, Mr. Carr feels that the term "bill" should be limited to such things as bill of account—a bill in the sense of billing somebody for goods. But if that were true that would make unnecessary and superfluous the words which follow it—the word "account".

The Court: That is the false baggage claim. All the defendant did in that case was to make a false baggage declaration, stating he only had \$850.00 when as a matter of fact he had \$19,500.00. The court said that was a document of the type covered by that section.

Mr. Bell: All the cases indicate a similarly broad interpretation should be given for the purpose of giving effect to the statute. [163]

Mr. Carr: May I add one thought, your Honor?

The Court: Yes.

Mr. Carr: If you hold as you now hold you will in my opinion make every check cashed in every bank in America a Federal offense if there is not sufficient funds in the bank. If it is under the deposit insurance corporation it will come under the jurisdiction of a Federal agency, and if it is in the Federal Reserve System it is still a Federal agency. Each time a check is drawn on a bank in the Federal Reserve System it certainly would

be a matter within the jurisdiction of the United States. Now, your Honor, I am sure that the statute was never contemplated for that nor does it on its surface or face cover a situation of that kind.

Mr. Bell: I do not believe that would follow. Sugar rationing was something entirely and exclusively a Federal function. The Federal Government delegated to the banks one part of that function, namely, the handling of the ration bank accounts, and even the deposit slips, one of which is in evidence here, bears on its face the statement: "United States of America, Sugar Ration Account", so the fear expressed by Mr. Carr I think is groundless.

The Court: Here is another District Court case under the same section, where a man was required to take an affidavit that he wasn't a Communist. The man gave a false statement. He submitted a false statement that he was not [164] a Communist. The court had no difficulty in holding that he could be prosecuted under this section.

Mr. Carr: But we have a different situation in this case in my opinion. That case comes under the provisions of the Act with reference to mis-statement of a material fact to any agency within the Government's jurisdiction.

The Court: The Marcus-Hess case was under the informer statute but the court had no difficulty in that case in holding that the money of the United States had been co-mingled with the state agencies and that the fraud by ribbing up the bidding was perpetrated against the agency and that it ultimately affected the Government so as to bring it within the informer statute.

Mr. Carr: That is right and I do not depart from any of those cases. My simple proposition is you are

taking something that does not come within the purview of the statute and making it so by changing the interpretation of the words either "bill" or "claim".

The Court: I have used several illustrations to indicate how the courts in interpreting Section 72, have had no difficulty in applying it to new instrumentalities, to new writings, private writings ranging from doctors' prescriptions to a druggist's record that he keeps of his prescriptions; to ration coupons, to claims for baggage—to anything that is a document, the object of which is to secure some advantage that you could not otherwise secure. [165]

I am of the view that the point is not well taken and the motion to acquit will be denied. We will recess until two o'clock.

(Whereupon, a recess was had until 2:00 o'clock p. m. of the same day.) [166]

Los Angeles, California, Wednesday, Sept. 24, 1947
2:00 P. M.

The Court: Call the case, Mr. Clerk.

The Clerk: United States of America versus James M. Fly, No. 19,342.

Mr. Carr: The defendant is ready.

Mr. Bell: The Government is ready.

The Court: Let the record show the jurors are in the jury box and the defendant is in court with his counsel.

Mr. Carr: So stipulated.

Mr. Bell: So stipulated.

The Court: You may proceed, gentlemen.

Mr. Carr: Mr. Fly, will you take the stand?

JAMES M. FLY,

called as a witness by and in his own behalf, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: James M. Fly.

Direct Examination

By Mr. Carr:

Q. Mr. Fly, I believe his Honor mentioned yesterday that the word "Mosca" in the Italian language means fly, is that right? A. That is right.

Q. So Fly is the name you have adopted as the American- [166-A] ized name?

A. It was done long before I was born. My father did it before me.

Q. I will show you Defendant's Exhibit A-1—first I will show you A-2. Where did you first see that?

A. In my—on my desk at 4356 Sunset Boulevard.

Q. State whether or not you opened it?

A. Yes, sir.

Q. And what did you find in it? I show you now Exhibit A-1.

A. That is the letter that I found in it, yes, sir.

Mr. Carr: I will offer this in evidence as Defendant's Exhibit A-1 and A-2.

The Court: They may be received.

(The documents referred to were thereupon marked as Defendant's Exhibits A-1 and A-2, and were received in evidence.)

Mr. Carr: That is all. You may cross examine.

Mr. Bell: I have no cross examination.

The Court: All right, step down.

Is there any further testimony?

Mr. Carr: We rest, your Honor.

The Court: Gentlemen, rather than excuse the jury, if you will approach the bench I will indicate to you what my action is going to be with reference to the instructions.

(The following proceedings were had at the bench and [166-b] without the hearing of the jury:)

The Court: Bring the defendant up here. Somebody has raised that question.

Mr. Carr: I am not going to raise that question, your Honor.

The Court: Very well.

Mr. Carr: That is only done by people who do not know better.

The Court: You have not presented any instructions.

Mr. Carr: No; the case finished so quickly I did not have time to prepare any instructions.

The Court: Very well. I am going to give this one, the first one. It is just a summary.

Mr. Carr: No. 1 we will call it.

The Court: Then the next one—this covers two pages. It is merely definitions. That is No. 2.

Then I will give No. 3, the powers of the President with some modifications. I am not going to give No. 3.

Mr. Carr: The next is No. 4.

The Court: I am giving 4, definition of powers. I am not going to give the next one, No. 5. I am not going to give No. 6. I am going to give my own.

Mr. Carr: How about No. 7?

The Court: Yes, I am giving that one. I am giving No. 8 also. [166-c]

Mr. Carr: May I have a minute to object to some of these?

The Court: You will have an opportunity to object after I have given them to the jury under the new rules.

Mr. Carr: I have got to object beforehand.

The Court: No, no, that is not the rule.

Mr. Carr: I thought the practice was that when the instructions are decided upon then counsel makes his objection.

The Court: No. I may change the wording in the instructions. In addition to that I give a number of my own instructions. That is the way it has been done ever since the new rules went into effect. The only reason I am giving this long one is because of the Corson case. They say I have to give it all.

Instruction No. 9: I do not think 2.8 is necessary. I think I will strike that out.

Mr. Carr: You are not going to give 2.8, are you?

The Court: I will strike that one out. I think it would be confusing.

Mr. Carr: Now, No. 10: I think the court should specify or instruct the jury whether it is a false bill, account, claim or certificate and not leave it to the jury to speculate on a matter of law as to what it is. In other words, if your theory of a claim is right they should [166-d] be instructed that the question is whether or not it is a claim. I don't think the jury should be allowed to speculate as to what it is.

It should be circumscribed as to what it is.

They should determine whether it is a false bill or claim or whatever it is.

The Court: I will put a question mark on that one.

Mr. Carr: Instruction No. 11. I will probably object to that on the ground the term "false sugar ration check" misleads the jury. Are you going to give No. 11? That isn't the charge—false sugar ration check. That is terminology not known to the law as far as I know.

The Court: Well, I will put a question mark on that one. The next is No. 12.

Mr. Carr: Of course I object to it on the ground it is not even consistent. I object to that one.

The Court: All right. I think that is just a summary.

Mr. Carr: Instruction No. 13.

The Court: I am going to give 13 down to here and then I am giving the definition of aiding and abetting of my own. The rest of them I shall not give. The rest of them I shall not give unless you want me to give one on an accomplice.

Mr. Carr: I wish you would give that accomplice instruction.

The Court: I give my own instruction on reasonable [166-e] doubt and my own instructions on intent and presumption of innocence.

All right, gentlemen. Let the record show counsel has been informed by the court of the instructions to be given to the jury.

You may proceed with your argument, Mr. Bell.

(An opening argument was made by Mr. Bell, followed by argument by Mr. Carr, that being followed by closing argument of Mr. Bell.)

The Court: We will recess at this time until 10:00 o'clock tomorrow morning.

(Whereupon, at 4:30 o'clock p. m., a recess was had until 10:00 o'clock a. m., Thursday, September 25th, 1947.) [166-f]

Los Angeles, California, Thursday, Sept. 25, 1947,
10:00 A. M.

The Court: Call the calendar, Mr. Clerk.

The Clerk: United States of America versus James M. Fly, No. 19,342.

Mr. Carr: The defendant is ready.

Mr. Bell: The Government is ready.

Mr. Carr: Your Honor, before you bring the jury in, I am somewhat confused and am not in position to object to some of these instructions.

The Court: There is no confusion at all, Mr. Carr. As I explained to you the other day, I was the first man to work under these new rules and I think I understand them. As to what I am going to do, I will do just as we did before the new rules went into effect. I have already informed you what I am going to do about the Government's instructions.

You did not present any and so I will instruct the jury and then the last question I will ask as soon as I have told them about the verdict, will be: Are there any objections to the instructions? And if you say yes, then I will excuse the jury and you will make your objections in open court.

Mr. Carr: No, I think your Honor misunderstood me. They were not numbered yesterday and when you

informed me—I am confused as to which ones you are going to give of the Government's. [167]

The Court: I have changed my mind about some of them.

Mr. Carr: I am not trying to be contentious. I am completely confused.

The Court: I was confused also. In the future I will insist that the instructions be numbered so I can intelligently act upon them.

Unfortunately I have to give this very long four-page instruction. I wish it was not necessary. It has to do with the ration bank system but I presume, under the Corson case we will have to.

Mr. Carr: That is the point I was going to make, your Honor. If I may take just a moment. For example, on page 9 you have sections of other offenses there and on page 9 you have, down at 15.8 (d) (b). They set up other offenses such as unlawful use and possession and overdrafts prohibited and several other crimes. There is nothing in this case about post-dated checks, nothing about overdrafts. There is nothing about those sections on page 9.

The Court: Mr. Bell, why can't we stop with 15.8 (d) and (b) and eliminate—

Mr. Bell: I feel in light of the Corson case it would be hazardous not to give these instructions. This is a description of the procedure set forth by law for the handling of checks. There has been considerable confusion injected into the case as to whether or not the man should have been [168] indicted for overdraft or whether this particular law applies or just what; when he is acting legally and when he isn't and I assume that

so far as the law itself is concerned the jury is a little uncertain and is waiting to hear your Honor express what is the law. It is simply what the law is and the procedure set forth in the regulations.

Mr. Carr: I think it is error, your Honor, to give an instruction covering overdrafts when there is no overdraft charged. The jury might well be confused in construing this as an overdraft and convicting him on that theory.

The Court: You know what the court said in the Corson case. Of course I criticize that decision. I think it was bad law. It is bad law because the man's defense in that case was not that he had possessed the coupons legally but that he simply did not have them. They were planted in his pocket but nevertheless they said I should have read the entire order.

Mr. Carr: That may be true. I am in accord with you but in this case it is all right—I am not objecting to reading the regulations, but when you read the offenses, other offenses that are not charged, and I am specifically referring to page 9 where it says:

“Post-dated checks prohibited: No person may issue or transfer a check before the date it bears.”

Mr. Bell: I would be willing to have that stricken out, [169] those two lines.

Mr. Carr: And

“overdraft prohibited: No check may be issued for an amount larger than the balance in the account on which it is drawn less the amount of outstanding checks drawn on that account.”

Mr. Bell: I think the jury is entitled to be instructed on that. Mr. Carr himself has more or less implied to the jury that is perfectly legal.

The Court: But 22 should be given.

Mr. Carr: 22 is a different proposition, but I object to the instruction on overdrafts. The jury could very well convict by being misled, your Honor, into believing this was an overdraft.

The Court: I think I will strike out that part of it. As a matter of fact, I wish I did not have to give it at all, but I presume I will have to.

Mr. Bell: I agree with your Honor. I think reading a long instruction is confusing but the Corson case implies it is necessary.

Mr. Carr: May I make one more suggestion?

The Court: Yes.

Mr. Carr: I am speaking now of the instruction that starts out:

“Although the first seven counts of the indictment—” [170] and then it says:

“The term false sugar ration check—”

The Court: I have changed the wording of that. I am going to instruct it is a bill or claim. I am going to eliminate the other two. I will give a straight instruction that under the law a check of the type involved here is a bill or claim which will make the issue here absolutely clear and you will have a question of law in case your client is convicted on any of the first seven counts.

The Court: If there is nothing more, Mr. Bailiff, will you bring in the jury?

(Whereupon, the jury returned to open court.)

The Court: Let the record show the jurors are in the jury box and the defendant is in court with his counsel.

Ladies and gentlemen of the jury, the court will now give you the instructions on the law to govern you in your determination of this case. All the instructions are written and will be read to you as written subject to such modification as I may make while reading them. The only oral instructions will be those at the end governing your conduct in the jury room.

You have already been informed if during your deliberations you desire to have the exhibits they will be sent to you. You are also entitled to have a copy of the indictment if you so desire, especially in a case like this [171] where you have to pass on 12 counts.

You are also entitled to have the instructions should you so desire. In case any question arises as to the meaning of an instruction you can have the entire set sent in to you by making your request known to the bailiff at the door.

The law of the United States permits a judge to comment on the facts in the case. Such comments are mere matters of opinion which the jury may disregard if they conflict with their own conclusions upon the facts. This for the reason jurors are the sole and exclusive judges of the facts in each case. However, it is not my custom to exercise this right nor shall I exercise it in the present case. I shall leave the determination of the facts in the case to you, satisfied as I am that you are fully capable of determining them without my aid. However, it is the exclusive province of the judge of this

court to instruct you as to the law that is applicable to the case, in order that you may render a general verdict upon the facts in the case, as determined by you, and the law as given you by the judge in these instructions. It would be a violation of your duty for you to attempt to determine the law or to base a verdict upon any other view of the law than that given you by the court,—a wrong for which the parties would have no remedy because it is conclusively presumed by the court and all [172] higher tribunals that you have acted in accordance with these instructions and as you have been sworn to do.

You are here for the purpose of trying the issues of fact that are presented by the allegations in the indictment and the plea of the defendant thereto. This duty you should perform uninfluenced by pity for the defendant or by passion or prejudice on account of the nature of the charge against him. You are to be governed, therefore, solely by the evidence introduced in this trial, and the law as given you by the court. The law will not permit jurors to be governed by mere sentiment, conjecture, sympathy, passion or prejudice, public opinion, or public feeling. Both the public and the defendant have a right to demand, and they do so demand and expect, that you will carefully and dispassionately weigh and consider the evidence and the law of the case and give to each your conscientious judgment; and that you will reach a verdict that will be just to both sides, regardless of what the consequences may be. The offenses with which the defendant is charged are: Making and using, and causing to be made and used a false bill, account, claim and certificate—sugar ration check—in a matter within the jurisdiction of an agency of the

United States; and illegal use and transfer of ration documents.

In this connection, you are instructed that the [173] indictment on file herein is a mere charge or an accusation against the defendant, and is not any evidence of the defendant's guilt, and no juror in this case should permit himself to be, to any extent, influenced against the defendant because or on account of such indictment on file.

It is the duty of the jury to decide whether the defendant be guilty or not guilty of the offense charged considering all the evidence submitted to you in the case.

The jury are the sole and exclusive judges of the effect and value of the evidence addressed to them and of the credibility of the witnesses who have testified in the case, and the character of the witnesses as shown by the evidence, should be taken into consideration, for the purpose of determining their credibility and the fact as to whether they have spoken the truth. And the jury may scrutinize not only the manner of witnesses while on the stand, their relation to the case, if any, but also their degree of intelligence. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testified, his interest in the case, if any, or his bias or prejudice, if any, against one or any of the parties, by the character of his testimony, or by evidence affecting his character for truth and honesty or integrity or by contradictory evidence. And the jury are the exclusive judges of his credibility. [174]

A witness may also be impeached by evidence that he made, at other times, statements inconsistent with his present testimony as to any matter material to the cause

on trial. A witness false in one part of his or her testimony is to be distrusted in others; that is to say, the jury may reject the whole of the testimony of a witness who has willfully sworn falsely as to a material point; and the jury, being convinced that a witness has stated what was untrue, not as a result of a mistake or inadvertence, but willfully and with the design to deceive, must treat all his or her testimony with distrust and suspicion and reject all unless they shall be convinced that notwithstanding the base character of the witness, that he or she has in other particulars sworn to the truth.

The testimony of a witness is said to be corroborated when it is shown to correspond with the representation of some other witness, or to comport with some fact or facts otherwise known or established by the evidence.

You must not consider as evidence or law any statements, arguments, comments or suggestions made by counsel during the trial. However, if counsel for either side have admitted, or stipulated to the existence of any fact, you must consider it proved without further evidence. You must not consider, for any purpose, any evidence offered and rejected, or which, after being received, has been stricken [175] out by the court. You must decide the case solely upon the evidence before you and the inferences which you may deduce therefrom, as they are stated in these instructions, and upon the law, as given you in these instructions.

The law does not require any defendant to prove his innocence, which, in many cases might be impossible. On the contrary, the law requires the Government to establish his guilt and that by legal evidence and beyond a reasonable doubt.

If you can reconcile the evidence before you upon any reasonable hypothesis consistent with the defendant's innocence, you should do so, and in that case, find the defendant not guilty.

Reasonable doubt is not a mere possible doubt. Because everything relating to human affairs, and depending on moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

While the defendant in a criminal action is not required to take the stand and testify, yet if he does so, his credibility and the value and effect of his evidence are to be weighed and determined by the same rules as the [176] credibility and effect and value of the evidence of any other witness is determined. And the test for determining the credibility of witnesses as given you in another part of this instruction are to be applied to his testimony alike with that of other witnesses.

There are two kinds of evidence by which the Government may sustain the charges made in an indictment—the one is known as direct and positive; the other, as indirect or circumstantial. Evidence is said to be direct and positive when the witnesses have testified of their own knowledge to matters having a direct bearing upon the issues in the case. Evidence is said to be indirect or circumstantial, on the other hand, when the witnesses testified to matters having only an indirect or circumstantial relationship to the issues in the case.

The law requires that all the circumstances necessary to show guilt must, themselves, be shown by evidence

beyond a reasonable doubt; that these circumstances must all be consistent with one another; that they must all be consistent with a defendant's guilt and that they must all be inconsistent with any reasonable theory or hypothesis except that of guilt.

If the circumstantial evidence measures up to all the foregoing requirements, it is the duty of the jury to return a verdict of guilty. If it fails to do so, in any one [177] of such particulars, your verdict should be not guilty.

The defendant is charged in the indictment in this case on 12 counts. The first seven of these counts charging violation of Title 18 of the U. S. Code, Section 80, which provides in part as follows:

“* * * whoever shall knowingly and willfully
* * * make or use, or cause to be made or used,
any false bills, receipts, vouchers, rolls, account,
claim, certificate, affidavit or deposition, knowing the
same to contain any fraudulent or fictitious state-
ment or entry in any matter within the jurisdiction
of any department or agency of the United States
Government * * * shall be punished as pro-
vided by law.”

The first seven counts of the indictment charge that the defendant on the dates indicated in these counts, knowingly and willfully made and used and caused to be made and used, false bills, accounts, claims, and certificates, namely, sugar ration checks in the amounts stated in these seven counts of the indictment, which checks were alleged to be drawn on the Santa Monica

and Vermont Branch of the Bank of America, and bearing the signature as maker, of James M. Fly, on behalf of the Italian-American Import Company, knowing the same to contain fraudulent and fictitious statements, in a matter within the jurisdiction of the Office of Price [178] Administration, an agency of the United States Government, namely, Sugar Ration Accounts, kept pursuant to the provisions of the Third Revised Ration Order No. 3, promulgated by said agency pursuant to law, in that at said time and place there was no sugar ration account in the name of the defendant personally, or in the name of the Italian-American Import Company in the Santa Monica and Vermont Branch of the Bank of America.

All the first seven counts are the same type of offense except that different checks and different dates were involved.

Counts 8 to 12, inclusive, charge a series of violations of the Second War Powers Act of 1942, as amended, and the ration orders issued under it. In these five counts it is charged that the defendant willfully used and transferred sugar ration checks drawn on the Santa Monica and Vermont Branch of the Bank of America, and bearing the signature, as maker, of James M. Fly, on behalf of the Italian-American Import Company, payable to Smart & Final, Limited, Unit 65, 834 West Jefferson Street, Los Angeles, California, in exchange for the amounts of sugar stated on the various checks in a way and for a purpose not permitted by a ration order in

that at the time these checks were used and transferred, there was no sugar ration account in the name of the defendant as an individual, or in the name of the [179] Italian-American Import Company, in the Santa Monica and Vermont Branch of the Bank of America.

Each of the counts in the indictment relates to a different transaction, making a total of 12 difference checks and 12 different occasions.

Count 1, involves a check for 10,000 pounds of sugar.

Count 2, involves a check for 1,500 pounds of sugar.

Count 3, involves a check for 1,600 pounds of sugar.

Count 4, involves a check for 3,500 pounds of sugar.

Count 5, involves a check for 10,000 pounds of sugar.

Count 6, involves a check for 10,000 pounds of sugar.

Count 7, involves a check for 5,000 pounds of sugar.

Count 8, involves a check for 5,000 pounds of sugar.

Count 9, involves a check for 5,000 pounds of sugar.

Count 10, involves a check for 2,500 pounds of sugar.

Count 11, involves a check for 3,000 pounds of sugar.

Count 12, involves a check for 2,500 pounds of sugar.

The court instructs you that a sugar ration check of the type involved in the first seven counts of the indictment is a bill or claim under the law under which these counts are drawn.

So that, concerning each of the counts 1 to 7, inclusive, of the indictment, if you believe beyond a reasonable doubt that the defendant James M. Fly, on or about the dates alleged in the indictment, knowingly and willfully made [180] or caused to be made or caused to be used, a false bill, or claim, to-wit, sugar ration checks as indicated in each of said counts drawn on the Santa Monica and Vermont Branch of the Bank of America, and bear-

ing the signature, as maker, of James M. Fly on behalf of the Italian-American Import Company, knowing the same to contain a fraudulent or fictitious statement or entry, in that at said times there was no sugar ration account in the name of defendant James M. Fly, also known as James M. Mosca, or in the name of the Italian-American Import Company in the Santa Monica and Vermont Branch of the Bank of America, then you will convict the defendant of the offense charged in that count.

But if you have any reasonable doubt as to whether any one or more of the elements I have read to you have been proved under any count or counts you will acquit the defendant as to that count or counts.

Although the first seven counts of the indictment charge that the defendant made and used, and caused to be made and used, a false bill, account, claim and certificate, to-wit, sugar ration checks, it is not necessary that the evidence show that the defendant did all four of these things, it being sufficient proof of the defendant's guilt if you find beyond a reasonable doubt, in conformity with all the other instructions of this court, that the defendant knowingly and willfully, either made or used, or caused to be made or used, such [181] false bill, account, claim and certificate, to-wit, the sugar ration checks involved.

Third Revised Ration Order No. 3, provides in part as follows:

“ARTICLE XV—Ration Banking

“Section 15.1. How accounts are authorized. Revised General Ration Order 5 and this Order require certain persons and permit others to have ration bank accounts. Only these persons may become depositors and they may open only the ac-

counts specifically authorized by or under Revised General Ration Order 5 and this order.

"Section 15.2. Separate depositor as to each account. Each person who opens more than one account is deemed to be a separate depositor as to each of his accounts.

"Section 15.3. How many accounts permitted. Not more than one account for any one establishment may be opened for sugar unless authorized by the Office of Price Administration.

"Section 15.4. Accounts opened where dollar accounts carried. Every account opened for any establishment must be opened at a bank carrying a dollar checking account for that establishment, unless otherwise authorized by the Office of Price [182] Administration.

"Section 15.5. Signature cards and other papers required. A person shall open his first account by signing and delivering to the bank completed signature cards supplied by the bank. He may open any additional account in the same bank by furnishing such additional signature cards as the bank may request. He may change the authorized signatures for an existing account by signed notice to the bank, and by furnishing such signature cards as the bank may request. He shall also, in all cases, furnish such references, proofs of identity and documents showing his authority to execute the signature cards as the bank may request.

"Section 15.6. Deposits (a). What to be deposited. A depositor shall deposit all evidences which are in his possession when he opens his account, or are thereafter accepted by him, in the

account carried for the establishment by or for which the evidences were received, and may not transfer them to any person for any purpose, unless otherwise provided by the Office of Price Administration. However, he shall not deposit in his account any evidence which has not yet become valid or which no longer is valid for deposit. [183]

“(b) How deposits are made. All ration evidences presented for deposit must be in the form prescribed by Revised General Ration Order 5 or this Order and accompanied by a deposit slip filled out in duplicate, in the form prescribed by the Office of Price Administration indicating each item deposited by type and amount, and in the case of a check, by transit number, unless permission to omit the transit number is granted by the Office of Price Administration. All evidences must be endorsed by the depositor before being deposited.

“(d) Person who fails to open a required account shall not transfer evidences. A person who is required to open an account but does not do so may not transfer ration evidences to any person for any purpose.

“Section 15.7. Issuance and use of checks. (a) When check to be issued. A check may be issued only by a depositor and only for a purpose permitted and with the effect prescribed by Revised General Ration Order 5 or this Order authorizing the account on which the check is drawn.

“Section 15.8. (d) (b) How checks are issued. Each check and its stub must be completely filled out before the check may be issued, but a check [184] register, duplicate voucher or any similar record

may be used in place of the check stub. Both check and stub or other record must contain the name of the person to whom the check is to be issued, and the date on which it is drawn and the amount of credits to be transferred. The check must bear the name of the account and the depositor's authorized signature or signatures.

"Section 22.10. Unlawful use or possession. No person shall at any time either use or have in possession or under his control or take delivery of any sugar, checks, coupons, stamps or ration books, where such possession, control, or acquisition is in violation of this Order.

"Section 22.13. (b) * * * unless expressly permitted by this Order or otherwise authorized by the Office of Price Administration, no person may surrender evidences except to authorize a delivery of sugar.

"Section 25.1. Meaning of terms used in this Order. Whenever the provisions of this Order impose or confer duties, obligations, rights or privileges upon an establishment or registering unit, such duties, obligations, rights and privileges shall be considered as being conferred or imposed upon the [185] person owning such establishment or registering unit with respect thereto."

The Second War Powers Act of 1942, as it applied during the period involved in this case, provides in part as follows:

"* * * whenever the President is satisfied that the fulfilment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or

for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense."

The Act also provides that:

"Any person who willfully performs any act prohibited or willfully fails to perform any act required by, any provision of this subsection (a) or any rule, regulation or order, thereunder, whether heretofore or hereafter issued, shall be guilty of"

an offense * * *.

The Second War Powers Act, as applicable in this case, also provides in part: [186]

"The President may exercise any power, authority or discretion conferred on him by this subsection (a), through such departments, agency, or officer of the Government as he may direct and in conformity with any rules or regulations which he may prescribe."

I instruct you that at all times material to this case, the Office of Price Administration was the agency which was given the power to ration sugar and to prescribe regulations as to such rationing, and that it did so.

I instruct you that a sugar ration account kept in banks pursuant to the provisions of Third Revised Ration Order No. 3, promulgated by said agency is a matter within the jurisdiction of an agency of the United States, namely, the Office of Price Administration.

Among the ration regulations promulgated under the authority of the Second War Powers Act of 1942, upon

which the last five counts of the indictment are based, are General Ration Order No. 8 and Third Revised Ration Order No. 3. I instruct you that these ration orders were in effect on all dates material to this case.

General Ration Order No. 8 in part provides as follows:

“Section 2.6. * * * No person shall acquire, use, permit the use of, possess or control a ration document except the person or the agent of the person [187] to whom such ration document was issued or by whom it was acquired in accordance with a ration order or except as otherwise provided by a ration order. No person shall use or transfer a token or other ration document except in a way and for a purpose permitted by a ration order.”

Concerning each of Counts 8 to 12, inclusive, of the indictment, if you believe beyond a reasonable doubt that the defendant on or about the dates alleged in the indictment willfully used or transferred a sugar ration check as charged in each such Counts in the indictment, in a way or for a purpose not permitted by a Ration Order in that at such times there was no sugar ration account in the name of the Defendant James M. Fly, also known as James M. Mosca, or in the name of the Italian-American Import Company in the Santa Monica and Vermont Branch of the Bank of America, then you will convict the defendant of the offense charged in that count or counts.

But, if you have any reasonable doubt as to whether any one or more of the elements I have read to you have been proved under any count or counts, you will acquit the defendant as to that count or counts.

In every criminal offense there must be concurrence of act and intent. This is especially true in an offense like the present one which requires that the Act shall be [188] done knowingly and willfully. This intent is a material element of the offense which, like all others, must be proved beyond a reasonable doubt.

In determining the question, you are to consider all the facts and circumstances in the case which touch the conduct of the defendant, as well as his declarations or admissions, if any.

Criminal intent may be implied from the acts, conduct, declarations or admissions of the defendant. Such acts, conduct, declarations and admissions, as shown by the evidence, considered in relation to the charge made, may establish criminal intent beyond a reasonable doubt.

You will note that under the indictments the acts are alleged to have been done knowingly, and willfully, as to the first seven counts or willfully as to the last five counts.

Doing or omitting to do a thing knowingly and willfully implies not only a knowledge of the thing, but a determination with a bad intent to do it or to omit doing it.

The word "willfully" denotes an act which is intentional or knowing, or voluntary, as distinguished from accidental. The word is also employed to characterize a thing done without ground for believing it is lawful, or conduct marked by careless disregard whether or not one has the right to so act. [189]

In order to convict the defendant of a crime charged in the indictment, it is not necessary that the evidence show that he, himself, committed each and every step necessary to the completion of each crime charged, nor that he was

the sole or even the dominating actor in the commission of the offense, but it is sufficient if you find that partly by himself and partly through other persons or with their help he aided in the criminal act charged. In this connection Section 332 of the Criminal Code reads as follows:

“Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces or procures its commission, is a principal.”

To aid means to further the interests or designs of another by assistance or cooperation, to give support, help to another, to assist.

To abet means to encourage, instigate or countenance.

Taken together the words as used in this statute are to be understood, as used in common parlance, according to the dictionary definition I have just given. They import assistance, cooperation, and encouragement of another in the commission of a prohibited act.

Conviction for the offenses charged in this indictment [190] may be based on evidence of accomplices.

An accomplice is a person who has knowingly participated in the acts charged as constituting the offense whether he is actually indicted or not. The witness Fred Peterson is an accomplice.

The testimony of an accomplice should be scrutinized carefully by the jury and you should act upon it with caution and care. However, if you believe such testimony and it carries conviction to you, it is sufficient, even in the absence of any corroborating evidence, to warrant a conviction, provided that from all the evidence, including that of the accomplice, you are convinced beyond a reasonable doubt of the guilt of the defendant.

Your first duty upon retiring to the jury room will be to select one of your number to act as foreman.

A jury in a Federal Court is what is known as a common law jury. It requires unanimity in all cases, both in civil and criminal cases and this is a criminal case and you will be governed by that rule. All 12 of you must agree upon a verdict before any verdict can be returned.

For your assistance the clerk has prepared a form of verdict which reads as follows:

Title of court and cause. "Verdict: We the jury in the above entitled cause find the defendant James M. Fly blank as charged in count one of the [191] indictment; and blank as charged in count two of the indictment; and blank as charged in count three of the indictment; and blank as charged in count four of the indictment; and blank as charged in count five of the indictment; and blank as charged in count six of the indictment; and blank as charged in count seven of the indictment; and blank as charged in count eight of the indictment; and blank as charged in count nine of the indictment; and blank as charged in count ten of the indictment; and blank as charged in count eleven of the indictment; and blank as charged in count twelve of the indictment; dated September blank 1947; blank foreman of the jury.

If you find the defendant guilty of count one of the indictment you will insert the word "guilty" in the place opposite that count. If you find him not guilty you will insert the words "not guilty".

If you find him guilty of count two you will insert the word "guilty" at that place, and if you find him not guilty you will insert those words. And without repeating it again that applies to every count, 1 to 12. As to each of these counts you will have to insert the proper word or words depending upon your verdict, either guilty or not guilty.

While, as I have stated, you must return a verdict [192] on all counts unless the court for good reason should agree to accept a verdict on less than all the counts of the indictment, it is not necessary that your verdict be the same. In other words, you may find a verdict as to one count and another verdict as to another count. You may find the defendant guilty as to one count and not guilty as to another count. Of course that doesn't apply only to the two groups, that is the first seven or the last five. It applies to any one within the group. You are free to find whatever verdict you desire on any of these counts depending upon the conviction you have arrived at.

Are there any objections to the instructions given the jury? If so the jury will be excused.

Mr. Carr: Before you excuse the jury I would like to request an additional instruction. I thought you usually gave it. That is the instruction where they are to consult with each other.

The Court: That is right, I did not give that. I will do so now.

I shall give you now the instruction which has been suggested by counsel.

You are instructed that the Government and the defendant are entitled to the individual opinion of each juror on the issue of fact in this case. It is the duty of each

of you to consider and weigh all the evidence in the [193] case, and from such evidence to determine, if you can, the question of guilt or innocence of the defendant. When you have so determined that question, you should not be influenced in giving your verdict by the mere fact that any number or all of your fellow jurors may have reached a different conclusion. If, after careful consideration of all the evidence, your mind is fairly made up, and you are convinced that you are right, it will be your duty to stand by your decision. But each juror should freely and fairly discuss with his fellow jurors the evidence and the deductions to be justly drawn therefrom; this it is his duty to do. If, after such a full and fair discussion with them, any juror is still satisfied that his decision is right, he should say so by his verdict. If, on the other hand, after such full and fair discussion, any juror is satisfied that his original decision was wrong, then he should unhesitatingly abandon such decision, and render his verdict according to his final decision.

Mr. Carr: Now, your Honor, I do have one or two objections. Shall I wait until you excuse the jury?

The Court: We will have to excuse the jury while you are presenting your objections. The jury will be excused for a few minutes.

(Whereupon, the jury retired from the courtroom.)

The Court: Let the record show the jury has withdrawn. [194]

Mr. Carr: My first objection is, just for the record, to the instruction that the check under Counts 1 to 7 are bills or a claim. We have dealt with that at length and I do not need to more fully state my reasons. It is simply our contention it is not a bill or a claim.

The Court: All right.

Mr. Carr: Now, Instruction No. 11 says that although the first seven counts of the indictment charge the defendant made and used and caused to be made and used false sugar ration checks,—I don't know how it has been changed. It is not necessary that the evidence show the defendant did all four of these things?

The Court: That is right. That is the usual instruction because the statute is in the conjunctive.

Mr. Carr: I just felt it was a little bit confusing.

The Court: No, it isn't. It simply tells them that whether he caused it to be done or any of the four elements it is sufficient. That is all that is necessary when you have a statute which is in the conjunctive. In other words, they have not chosen any one of the four elements; they have charged them all so I am telling the jury that they can convict, if they are satisfied that he did it himself or caused it to be done and then of course with that you add the instruction on principals and the definition of the words "aid and abet". There can be no confusion. [195]

Mr. Carr: Very well, your Honor. Now, Instruction 8, at page 9 of the Government's requested instructions, I must object to the reading of Section 15.7 and Section 22.10 for the reason that in hearing your Honor read that I believe that it will confuse the jury into thinking that they may convict if the facts show a violation of 15.7 or Section 22.10.

The Court: These relate to the last count which make it unlawful to take delivery of such possession. Those are the penalty parts of those sections.

Mr. Carr: He is charged with violation of 2.6. That is where I think the confusion lies and I think the jury might well be confused into believing, no matter how he violated the ration order, he is guilty, and that is not the charge in the last five counts.

That is my objection to Section 15.7 and Section 22.10.

The Court: That is required under the Corson case.

Mr. Carr: I think the Corson case is wrong.

The Court: I know it is wrong but I cannot convince the Circuit Court of Appeals it is wrong. I think it is wrong and I have said so in writing at least twice and in talking to the judges themselves, but they say that the entire ration order should be read so that they would know under what condition lawful possession may be had. [196]

I am sorry I am compelled to do that.

Mr. Carr: The only other instruction that I wish to object to at this time is Instruction 10 and that is the instruction which uses the words, "False bill, account, claim or certificate." The page is not numbered. It starts off, "Concerning each of counts 1 to 7, inclusive," and so forth. It is the same objection that went to the other instructions with respect to a bill or a claim.

The Court: I could not eliminate those words because it would not be a correct paraphrasing of the indictment. That is the form we used before the Corson case where

we merely gave the elements of the offense without repeating them. The Supreme Court of California has held that that is a good instruction. In a murder case you do not have to say, "Murder is the unlawful taking of human life with malice aforethought." You can say, "If you believe on such and such a day John Smith killed so and so with malice aforethought he is guilty of the offense." But in the Corson case they say, "No, you have got to tell them it is the law."

Mr. Carr: That is the end of my suggestions, your Honor.

Mr. Bell: I have one, your Honor, so it will be on the record. It is in connection with Government's Instruction 8, page 9, the failure to give that portion of Regulation 15.8, Section 15.8, followed by (d) and (b) and then (d) under [197] that:

"No check may be issued for an amount larger than the balance in the account on which it is drawn less the amount of outstanding checks drawn on that account."

The Court: I agree with Mr. Carr that that might be confusing because there is no charge of an overdraft. Of course it was argued by Mr. Carr that it may have been just an overdraft but there is no charge of overdraft. He is charged with having no account in the name under which he drew checks and we have to stick with that.

Mr. Bell: That is my only suggestion.

The Court: All right, call the jury.

(Whereupon, the jury returned to open court.)

The Court: All right, ladies and gentlemen of the jury, so you will understand the proceedings we have just had while you were absent from the courtroom is this. Under the law the attorneys for both sides have the privilege of objecting to any instruction given by the court to the jury or an objection to the court's failure to give any instruction requested by either side. That has to be done outside the presence of the jury. In that manner the court is given an opportunity to supply the missing instructions if he deems they are proper. Furthermore, it is the only place in the record and in the proceeding where they can do so. That is [198] what took place in this case during your absence. However, I have not modified my instructions to you in any manner whatsoever. The instructions stand as I have given them to you and if you desire the manuscript of the instructions sent to you after beginning your deliberations they will be sent to you if you make that request to the bailiff.

The clerk will swear the bailiff.

(Whereupon, the bailiff was sworn by the clerk.)

The Court: Ladies and gentlemen of the jury, you will now find the bailiff and you will begin your deliberations in the case. I hand to the bailiff the form of verdict.

(Whereupon, the jury retired from the courtroom.)

The Court: We will stand in recess until we hear from the jury.

The Court: Let the record show the jury in the case of United States versus James M. Fly, No. 19,342, have returned to the courtroom and the defendant is in court with his counsel.

Ladies and gentlemen of the jury, have you agreed upon a verdict?

The Foreman: We have, your Honor.

The Court: Will you send the verdict to the court through the bailiff?

The clerk will read the verdict.

The Clerk: "United States District Court, Southern [199] District of California, Central Division. United States of America, plaintiff, versus James M. Fly, charged as James M. Mosca, defendant, No. 19,342 Criminal Verdict.

"We the jury in the above entitled cause, find the defendant, James M. Fly, guilty as charged in Count 1 of the indictment; and guilty as charged in Count 2 of the indictment; and guilty as charged in Count 3 of the indictment; and guilty as charged in Count 4 of the indictment; and guilty as charged in Count 5 of the indictment; and guilty as charged in Count 6 of the indictment; and guilty as charged in Count 7 of the indictment; and guilty as charged in Count 8 of the indictment; and guilty as charged in Count 9 of the indictment; and guilty as charged in Count 10 of the indictment; and guilty as charged in Count 11 of the indictment; and guilty as charged in Count 12 of the indictment. Dated September 25, 1947. William J. Doran, Foreman of the Jury."

Ladies and gentlemen of the jury, is this verdict as presented and read the verdict of each of you? So say you all.

The Foreman: Yes, your Honor.

The Court: Do you desire the jury be polled individually?

Mr. Carr: No, I do not desire that, your Honor.
[200]

(Whereupon, the jury was dismissed.)

[Endorsed]: Filed Nov. 12, 1947. Edmund L. Smith, Clerk. [201]

[Endorsed]: No. 11753. United States Circuit Court of Appeals for the Ninth Circuit. James M. Mosca, otherwise known as James M. Fly, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed November 17, 1947.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for
the Ninth Circuit

In the Circuit Court of Appeals of the United States
in and for the Ninth Circuit

No. 11753

JAMES M. MOSCA, otherwise known as
JAMES M. FLY,

Defendant and Appellant,

v.

UNITED STATES OF AMERICA,

Plaintiff and Appellee.

ORDER OF COURT TO CONSIDER ORIGINAL
EXHIBITS

It appearing that James M. Mosca, otherwise known as James M. Fly, Defendant and Appellant above named, has filed Notice of Appeal in the above matter and is now in the process of perfecting said Appeal;

It also appearing that Counsel for the Appellee on the 29th day of October, 1947, has consented with Attorney for Appellant herein that all the original Exhibits be forwarded by the Clerk of the U. S. District Court to the Clerk of the Circuit Court of Appeals for the Ninth Circuit;

It further appearing to the Court that on the 29th day of October, 1947, the Honorable Paul J. McCormick, U. S. District Judge for the Southern District of California, signed an order for transmission of all original Exhibits to the Ninth Circuit Court of Appeals;

It is ordered that all of the original Exhibits in the above action may be made a part of the Record on Appeal in the above-entitled matter to be considered by this Honorable Court in the within Appeal in their original form, as transmitted by the Clerk of the U. S. District Court.

Dated: This 3d day of December, 1947.

FRANCIS A. GARRECHT

Judge, U. S. Circuit Court of Appeals for the
Ninth Circuit.

[Title of Circuit Court of Appeals and Cause]

APPLICATION FOR ORDER OF COURT TO
CONSIDER ORIGINAL EXHIBITS

Comes now James M. Mosca, otherwise known as James M. Fly, Defendant and Appellant above named, by and through his attorney, Charles H. Carr, and makes application to this Honorable Court as follows:

That this Honorable Court consider as a part of the Record on Appeal all original Exhibits in the above named action which have been transmitted by the Clerk of the U. S. District Court for the Southern District of California to the Clerk of the U. S. Circuit Court of Appeals for the Ninth Circuit and which have not been made a part of the printed record.

This application is being made upon the ground that it would be impractical and costly to include them all in the printed record.

Dated: December 1, 1947.

Respectfully submitted,

CHARLES H. CARR

Attorney for Defendant and Appellant

Received copy of the within Order of Court to Consider Original Exhibits and Application for Order of Court to Consider Original Exhibitions this 2 day of December, 1947. James M. Carter, U. S. Attorney, Attorney for Appellee, United States of America, by Velonis Bonhus.

[Endorsed]: Filed Dec. 3, 1947. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause]

STATEMENT OF POINTS ON WHICH
APPELLANT INTENDS TO RELY ON APPEAL

Appellant, James M. Mosca, otherwise known as James M. Fly, herewith sets forth a concise statement of the points on which he intends to rely on this appeal, viz.:

I.

The District Court erred in denying Appellant's Motion to Dismiss the Indictment.

II.

The District Court erred in denying Appellant's Motion for a Judgment of Acquittal made under Rule 29 of the Federal Rules of Criminal Procedure.

III.

The District Court erred in admitting into evidence Government's Exhibit No. 13.

IV.

The District Court erred in admitting the testimony of Fred Peterson, a witness for the Government, concerning alleged arrangements he made with Appellant to destroy checks.

V.

The District Court erred in giving Government's Requested Instruction No. 8.

VI.

The District Court erred in giving Government's Requested Instruction No. 10.

VII.

The District Court erred in instructing the jury that the sugar ration checks involved in the first seven counts of the Indictment were bills or claims under Section 80, Title 18, U. S. C. A.

CHARLES H. CARR

Attorney for Appellant

Received copy of the within * * * Statement of Points on Which Appellant Intends to Rely on Appeal this 2 day of December, 1947. James M. Carter, U. S. Attorney, Attorney for Appellee, United States of America, by Velonis Bonhus.

[Endorsed]: Filed Dec. 3, 1947. Paul P. O'Brien, Clerk.

